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APPENDIX

SUPREME COURT OF THE UNITED STATES

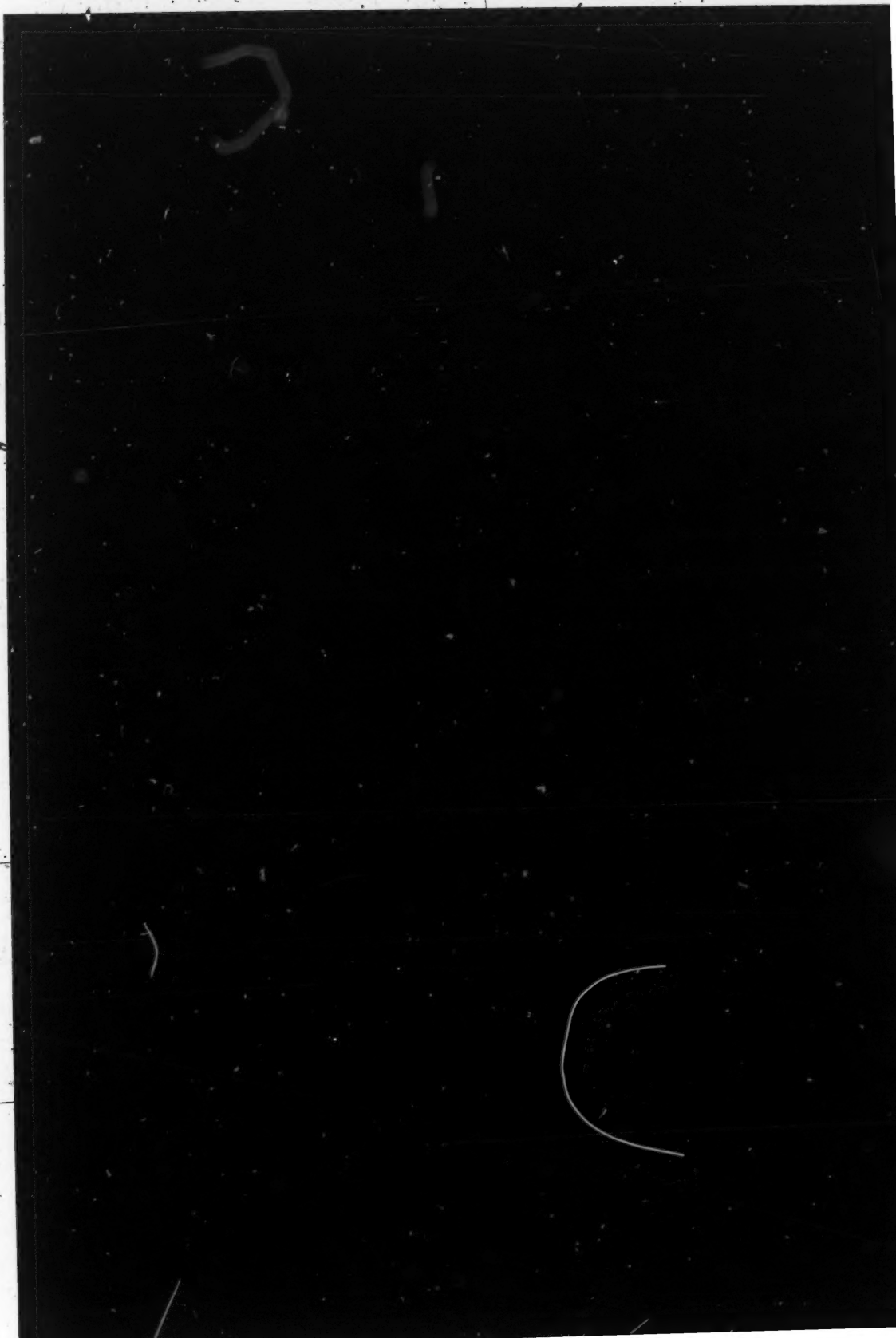
OCTOBER TERM, 1967

No. 701

IN THE MATTER OF
BUDDY LYNN WHITTINGTON, PETITIONER

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF OHIO, FAIRFIELD COUNTY

PETITION FOR CERTIORARI FILED APRIL 11, 1967
CERTIORARI GRANTED OCTOBER 9, 1967



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IN THE JUVENILE COURT OF FAIRFIELD COUNTY, OHIO

Case No. 6183-J

In the Matter of

BUDDY LYNN WHITTINGTON, AN ALLEGED DELINQUENT CHILD

ENTRY

Filed Sep. 20, 12 49, P.M. '66 Issac Rowles Clerk of Courts of Appeals Fairfield County

IN THE JUVENILE COURT OF FAIRFIELD COUNTY, OHIO

Case No. 6183-J

In the Matter of

BUDDY LYNN WHITTINGTON, AN ALLEGED DELINQUENT CHILD

ENTRY

TRANSCRIPT—JUVENILE COURT APPEARANCE Docket (Minors) #9, Page 514

In the Matter of Buddy Lynn Whittington, an alleged delinquent child.

Age—14 years Color—White Resides at Fremont St., Baltimore, Ohio.

School and Teacher—Liberty Union School, Baltimore, Ohio.

Name, residence, nativity and occupation of parents (or of Guardian or Relative)

Orville A. Whittington, father, Fremont St., Baltimore, Ohio.

Ollie Mae Whittington, mother, Fremont St., Baltimore, Ohio.

Date Month	Day	Year	Minute of Filing every paper and brief note of every order or proceeding	Journal No.	Page
Aug.	5	66	Complaint filed alleging that Buddy Lynn Whittington did, on or about the 29th day of July, 1966, in the Village of Baltimore, County of Fairfield, State of Ohio, unlawfully, purposely and maliciously kill one Gladys Williard, filed by Elwood R. Phillips, Baltimore, Ohio		
Aug.	5	66	Journal Entry—of filing complaint	13	1

Date Month	Day	Year	Minute of Filing every paper and brief note of every order or proceeding	Journal No.	Page
Aug.	5	66	Journal Entry—order for warrant to arrest	13	1
Aug.	5	66	Warrant to arrest minor issued to William Rutherford		
Aug.	5	66	Warrant to arrest returned and filed by William Rutherford		
Aug.	5	66	Entry—(showing counsel for defendant)	13	1
Aug.	5	66	Journal Entry—(continuance)	13	1
Aug.	10	66	Motion—(to release defendant during pendency of said cause)		
Aug.	10	66	Motion—(to dismiss because of improper arrest)		
Aug.	10	66	Motion—(to dismiss because the entire Juvenile Court Act is unconstitutional)		
Aug.	11	66	Journal Entry—on arraignment, Plea of "not guilty"	13	2
Aug.	12	66	Motion—(to suppress evidence)		
Aug.	19	66	Precipe filed directing as follows:		
Aug.	19	66	To the Sheriff of Fairfield County, Ohio, for service of subpoena to be made upon Dr. L. L. Kersell, County Health Dept., Lancaster, Ohio		
			To the Sheriff of Fairfield County, Ohio, for service of subpoena to be made upon Elwood Phillips, Chief of Police, Baltimore, Ohio		
			To the Sheriff of Fairfield County, Ohio, for service of subpoena to be made upon William Rutherford, Juvenile Court		

Date Month	Day	Year	Minute of Filing every paper and brief note of every order or proceeding	Journal No.	Page
Aug.	19	66	To the Sheriff of Fairfield County, Ohio, for service of subpoena to be made upon Herman Williard, 220 Fremont St., Baltimore, Ohio		
			To the Sheriff of Fairfield County, Ohio, for service of subpoena to be made upon Aurilla Goodrich, % Stella Brandon, Route 204, Route #1, Baltimore, Ohio		
			To the Sheriff of Fairfield County, Ohio, for service of subpoena to be made upon Ned K. Webb, Eagle-Gazette Office, Lancaster, Ohio		
			To the Sheriff of Franklin County, Ohio, for service of subpoena to be made upcn Dr. Kim, Dept. of Pathology, University Hospital, Columbus, Ohio		
Aug.	23	66	Return of subpoena by Sheriff of Fairfield County, Ohio, showing personal service made upon Dr. L. L. Kersell, County Health Dept., Lancaster, Ohio, by reading of said writ		
			Return of subpoena by Sheriff of Fairfield County, Ohio, showing personal service made upon Elwood Phillips, Chief of Police, Baltimore, Ohio, by reading of said writ		
			Return of subpoena by Sheriff of Fairfield County, Ohio, showing personal service made upon William M. Rutherford, Juvenile Court		

Date Month	Day	Year	Minute of Filing every paper and brief note of every order or proceeding	Journal No.	Page
Aug.	23	66	Return of subpoena by Sheriff of Fairfield County, Ohio, showing personal service made upon Herman Williard, 220 Fremont St., Baltimore, Ohio		
			Return of subpoena by Sheriff of Fairfield County, Ohio, showing personal service made upon Aurilla Goodrich, % Stella Brandon, Route 204, Route #1, Baltimore, Ohio		
			Return of subpoena by Sheriff of Fairfield County, Ohio, showing personal service made upon Ned K. Webb, Eagle-Gazette Office, Lancaster, Ohio		
Aug.	24	66	Motion—(to fix bond for defendant or release defendant pending trial)		
Aug.	25	66	Entry—(on motion to release defendant during pendency of said cause; motion overruled)	13	2
Aug.	25	66	Entry—(on motion to dismiss case because of improper arrest; motion overruled)	13	2
Aug.	25	66	Entry—(on motion to dismiss case because entire Juvenile Court Act is unconstitutional; motion overruled)	13	3
Aug.	25	66	Precipe filed directing as follows:		
Aug.	26	66	To the Sheriff of Fairfield County, Ohio, for service of subpoena to be made upon Dr. L. L. Kersell, County Health Dept., Lancaster, Ohio		

Date Month	Day	Year	Minute of Filing every paper and brief note of every order or proceeding	Journal No.	Page
Aug.	26	66	To the Sheriff of Fairfield County, Ohio, for service of subpoena to be made upon Elwood Phillips, Chief of Police, Baltimore, Ohio		
			To the Sheriff of Fairfield County, Ohio, for service of subpoena to be made upon William Rutherford, Juvenile Court		
			To the Sheriff of Fairfield County, Ohio, for service of subpoena to be made upon Herman Williard, 220 Fremont St., Baltimore, Ohio		
			To the Sheriff of Fairfield County, Ohio, for service of subpoena to be made upon Aurilla Goodrich, % Stella Brandon, Route 204, Route #1, Baltimore, Ohio		
			To the Sheriff of Fairfield County, Ohio, for service of subpoena to be made upon Ned K. Webb, Eagle-Gazette Office, Lancaster, Ohio		
			To the Sheriff of Franklin County, Ohio, for service of subpoena to be made upon Dr. F. E. Cuppage, University Hospital, Columbus, Ohio		
Aug.	26	66	Return of subpoena by Sheriff of Franklin County, Ohio, showing service made upon Dr. Kim, Dept. of Pathology, University Hospital, Columbus, Ohio, by leaving a copy of said writ at his usual place of business		

Date Month	Day	Year	Minute of Filing every paper and brief note of every order or proceeding	Journal No.	Page
Aug.	26	66	Request—(for typed record of testimony and proceedings of hearing held Thursday, August 25th, 1966)		
Aug.	30	66	Request—(for an official court reporter to take record of all evidence and proceedings in hearing on Friday, September 2nd, 1966, at 9:00 a.m.)		
Aug.	31	66	Return of subpoena by Sheriff of Fairfield County, Ohio, showing personal service made upon Dr. L. L. Kersell, County Health Dept., Lancaster, Ohio		
			Return of subpoena by Sheriff of Fairfield County, Ohio, showing personal service made upon Elwood Phillips, Chief of Police, Baltimore, Ohio		
			Return of subpoena by Sheriff of Fairfield County, Ohio, showing personal service made upon William Rutherford, Juvenile Court, by reading of said writ		
			Return of subpoena by Sheriff of Fairfield County, Ohio, showing personal service made upon Herman Williard, 220 Fremont St., Baltimore, Ohio, by reading of said writ		
			Return of subpoena by Sheriff of Fairfield County, Ohio, showing personal service made upon Aurilla Goodrich, % Stella Brandon, Route 204, Route #1, Baltimore, Ohio, by reading of said writ		

Date Month	Day	Year	Minute of Filing every paper and brief note of every order or proceeding	Journal No.	Page
Aug.	31	66	Return of subpoena by Sheriff of Fairfield County, Ohio, showing personal service made upon Ned K. Webb, Eagle-Gazette Office, Lancaster, Ohio		
Sept.	1	66	Entry—(on motion to fix bond for defendant or release defendant pending trial; motion denied)	13	3
Sept.	1	66	Return of subpoena by Sheriff of Franklin County, Ohio, showing service made upon Dr. F. E. Cuppage, University Hospital, Columbus, Ohio, by leaving a copy of said writ at his usual place of residence		
Sept.	1	66	Precipe filed directing as follows:		
			To the Sheriff of Fairfield County, Ohio, for service of subpoena to be made upon Lula Williard, 226 Fremont St., Baltimore, Ohio		
			To the Sheriff of Fairfield County, Ohio, for service of subpoena to be made upon Jack Williard, 220 Fremont Street, Baltimore, Ohio		
			To the Probation Officer of Fairfield County, Ohio, for service of subpoena to be made upon Orville Whittington, Baltimore, Ohio		
			To the Probation Officer of Fairfield County, Ohio, for service of subpoena to be made upon Ollie Whittington, Baltimore, Ohio		

Date Month	Day	Year	Minute of Filing every paper and brief note of every order or proceeding	Journal No.	Page
Sept.	1	66	Entry—(continuance, trial set for September 2nd, 1966, at 9:00 a.m.)	13	3
Sept.	2	66	Return of subpoena by Sheriff of Fairfield County, Ohio, showing personal service made upon Lulu Williard, 226 Fremont St., Baltimore, Ohio		
			Return of subpoena by Sheriff of Fairfield County, Ohio, showing personal service made upon Jack Williard, 220 Fremont St., Baltimore, Ohio, by reading of said writ		
Sept.	2	66	Return of subpoena by Probation Officer of Fairfield County, Ohio, showing personal service made upon Orville Whittington, Baltimore, Ohio		
			Return of subpoena by Probation Officer of Fairfield County, Ohio, showing personal service made upon Ollie Whittington, Baltimore, Ohio		
Sept.	2	66	Motion—(to dismiss proceedings against defendant because of the unconstitutionality of the Juvenile Code Provisions of Ohio)		
Sept.	2	66	Motion—(to employ an official Court reporter)		
Sept.	2	66	Motion—(to dismiss case for reason that the defendant has been confined for 27 days, that he was refused bond, was deprived his constitutional rights and has not been granted a speedy trial)		

Date Month	Day	Year	Minute of Filing every paper and brief note of every order or proceeding	Journal No.	Page
Sept.	7	66	Entry—(on motion to suppress evidence; motion denied)	13	4
Sept.	7	66	Entry—(on motion to dismiss proceedings against defendant because of the unconstitutionality of the Juvenile Code Provisions of Ohio; motion denied)	13	4
Sept.	7	66	Entry—(on motion to employ an official court reporter; motion denied)	13	4
Sept.	7	66	Entry—(on motion to dismiss case for reason that the defendant had been confined for 27 days, that he was refused bond, was deprived of his constitutional rights and has not been granted a speedy trial; motion overruled and denied)	13	4
Sept.	7	66	Application—(for Court's permission to allow defendant to attend his grandfather's funeral, September 7th, 1966)		
Sept.	7	66	Entry—(application approved and defendant released in the custody of his parents to attend the funeral of his grandfather)	13	4
Sept.	7	66	Entry—(adjudged defendant to be a delinquent child and committed temporarily to the Juvenile Diagnostic Center of the Ohio Youth Commission for a report of mental and physical examination)	13	4
Sept.	12	66	Warrant to convey ordered and issued to William M. Rutherford		

Date			Minute of Filing every paper and brief note of every order or proceeding	Journal	
Month	Day	Year		No.	Page
Sept.	12	66	Warrant to convey returned and filed by William M. Rutherford		
Sept.	12	66	Notice of appeal filed		
Sept.	12	66	Request for preparation of Bill of Exceptions filed		
Sept.	12	66	Precipe for transcript filed		
Sept.	20	66	Filed in the Court of Appeals		

COMPLAINT

As to Delinquent, Neglected, Dependent or Crippled Child

Rev. Code, Sec. 2151.27

JUVENILE COURT, FAIRFIELD COUNTY, OHIO

Case No. 6183-J

In the Matter of

BUDDY LYNN WHITTINGTON, AN ALLEGED DELINQUENT CHILD

ENTRY

The undersigned says that he has knowledge of Buddy Lynn Whittington, a minor under the age of [2] 18 years, to-wit, the age of 14 years; that said minor appears to be a [1] delinquent child in this: that he did, on or about the 29th day of July, 1966, in the Village of Baltimore, County of Fairfield, State of Ohio, unlawfully, purposely and maliciously kill one Gladys Willard, contrary to Section 2901.05 of the Revised Code of Ohio.

Said minor is not an inmate of a state institution or an institution incorporated under the laws of the State for the care and correction of delinquent, neglected and dependent children.

The name of the person having custody or control of said minor, or with whom said child now is, is Orville A. Whittington and Ollie Mae Whittington, father and mother of said child, and resides at Fremont St., Baltimore, Fairfield County, Ohio.

That —— the [3] —— of said child resides at [4] ——.

Elwood R. Phillips.

---

[1] Delinquent, Neglected, Dependent, Crippled, Physically handicapped.

[2] Insert "Eighteen," if delinquent, neglected or dependent; insert "Twenty-one," if crippled or otherwise physically handicapped.

[3] "Parent," "Guardian" or "Custodian."

[4] Here give place of residence, also nationality and occupation of parents or nearest relatives, living or dead.

The State of Ohio, Fairfield County, ss.

The undersigned being duly sworn says that the statements in the foregoing complaint are true as he verily believes.

Elwood R. Phillips.

Sworn to before me and signed in my presence this 5th day of August, 1966.

Robert U. Hastings, Judge of the Juvenile Court.
by Lois Fricker, Deputy Clerk.

Filed Aug. 5, 1966. Robert U. Hastings, Juvenile Judge.

No. 6183-J

Juv. App. Doc. No. 9 Page 514

Juvenile Court, Fairfield County, Ohio.

In the Matter of

BUDDY LYNN WHITTINGTON, AN ALLEGED DELINQUENT CHILD

COMPLAINT

Filed in — 19—.

——, ——, Judge of the Juvenile Court. By ——, ——, Deputy Clerk.

Filed Aug. 5, 1966. Robert U. Hastings, Juvenile Judge.

IN THE JUVENILE COURT OF FAIRFIELD COUNTY, OHIO

Case No. 6183-J

August 5th, 1966.

In the Matter of

BUDDY LYNN WHITTINGTON, AN ALLEGED DELINQUENT CHILD

JOURNAL ENTRY—OF FILING COMPLAINT

This day came Elwood R. Phillips, Chief of Police, Baltimore, Ohio, and filed herein a complaint alleging Buddy Lynn Whittington to be a delinquent child and that said child is now in the custody of his parents, Orville A. Whittington, and Ollie Mae Whittington, who reside at Fremont Street, Baltimore, Ohio.

Robert U. Hastings, Judge of the Juvenile Court.

Approved:

E. Raymond Morehart, Prosecuting Attorney.

Juv. Jour. #13, Page 1

Juv. Doc. #9, Page 514

Filed Aug. 5, 1966. Robert U. Hastings, Juvenile Judge.

JOURNAL ENTRY—Order for Warrant to Arrest

On Affidavit Filed Charging Offense Against Minor

Gen'l Code, Sec. 1683-1

IN THE JUVENILE COURT OF FAIRFIELD COUNTY, OHIO

August 5, 1966.

In the Matter of

BUDDY LYNN WHITTINGTON, AN ALLEGED DELINQUENT CHILD

CHARGE OF OFFENSE AGAINST MINOR

This day, Elwood R. Phillips filed with the Clerk of this Court an affidavit setting forth the charge against the accused person, said defendant Buddy Lynn Whittington, it is therefore ordered that a warrant issue to William Rutherford, Probation Officer of this County, for the arrest of said Defendant, who when arrested, shall be taken forthwith before the Judge of this Court, and this cause is continued.

Robert U. Hastings, Judge.

Filed Aug 5, 1966, Robert U. Hastings, Juvenile Judge.

The State of Ohio, —— County, ss.

I, ——, Judge of the Juvenile Court, within and for said County, and in whose custody the Files, Journals and Records of said Court are required by the Laws of the State of Ohio to be kept, do hereby certify that the foregoing is taken and copied from the Journal of the proceedings of said Court; that the same has been compared by me with the original entry on said Journal, and that it is a true and correct copy thereof.

Witness my signature and the seal of said Court, this — day of —— 19 —.

——, ——, Judge of Juvenile Court.

Filed Aug. 5, 1966. Robert U. Hastings, Juvenile Judge.

No. 6183-J

Juv. App. Doc. No. 9 Page 514

Juvenile Court, Fairfield County, O.

THE STATE OF OHIO

v.

BUDDY LYNN WHITTINGTON, AN ALLEGED DELINQUENT CHILD

CHARGE OF OFFENSE AGAINST MINOR

JOURNAL ENTRY

Order for Warrant to Arrest

Dated ——, 19 —

Juv. Jour. Vol. 13 Page 1

Warrant to Arrest Minor

(On Complaint)

Gen'l Code, Sec. 1639-26, 3038, 13432-9,-19

The State of Ohio, Fairfield County, ss.

To William Rutherford, Probation Officer of said County, Greeting:

Whereas, there has been filed in this Court a complaint, duly sworn to, of which the following is a copy:

In the Juvenile Court of Fairfield County, Ohio

Case No. 6183-J

In the Matter of

Buddy Lynn Whittington, an Alleged Delinquent Child

The undersigned says that he has knowledge of Buddy Lynn Whittington, a minor under the age of 18 years, to-wit, the age of 14 years; that said minor appears to be a delinquent child in this: that he did, on or about the 29th day of July, 1966, in the Village of Baltimore, County of Fairfield, State of Ohio, unlawfully, purposely and maliciously kill one Gladys Willard, contrary to Section 2901.05 of the Revised Code of Ohio.

Said minor is not an inmate of a state institution, or any institution incorporated under the laws of the State for the care and correction of delinquent, neglected and dependent children.

The name of the person having custody or control of said minor, or with whom it now is, is Orville A. Whittington and Ollie Mae Whittington, father and mother of said child and resides at Fremont Street, Baltimore, Fairfield County, Ohio.

That —— the —— of said child resides at ——.

s/Elwood R. Phillips.

The State of Ohio, Fairfield County, ss.

The undersigned being duly sworn says that the statements in the foregoing complaint are true as he verily believes.

s/Elwood R. Phillips.

Sworn to before me and signed in my presence this 5th day of August 1966

s/Robert U. Hastings, Judge of the Juvenile Court.
by s/Lois Fricker, Deputy Clerk.

These are therefore to command you to take the said Buddy Lynn Whittington if he be found in your County, or, if he has fled, that you pursue after him into any other County in the State, and take and safely keep the said Buddy Lynn Whittington so that you have his body forthwith before the Judge of said Juvenile Court to answer the said complaint and be further dealt with according to law.

Given under my hand and the seal of said Court, at Lancaster, Ohio, this 5th day of August, 1966.

Robert U. Hastings, Judge of the Juvenile Court.
By Lois Fricker, Deputy Clerk.

RETURN

Office, Fairfield County, Ohio

Received this Writ Aug. 5, 1966, at 8:00 o'clock A.M., and pursuant to its command, on the 5th day of Aug., 1966, I executed the same by arresting the said Buddy Lynn Whittington and now have him before the Judge of the Juvenile Court.

Wm. Rutherford, Probation Officer.

Filed Aug. 5, 1966. Robert U. Hastings, Juvenile Judge.

No. 6183-J

Juv. App. Doc. No. 9 Page 514

Juvenile Court, Fairfield County, Ohio

In the Matter of

BUDDY LYNN WHITTINGTON, AN ALLEGED DELINQUENT CHILD

WARRANT TO ARREST MINOR

(On Complaint)

Issued ——, 19 —.

Returned and Filed, ——, 19 —.

——, ——, Judge of the Juvenile Court. By ——, ——, Deputy Clerk.

IN THE JUVENILE COURT OF FAIRFIELD COUNTY, OHIO

Case No. 6183-J

August 5th, 1966.

In the Matter of

BUDDY LYNN WHITTINGTON, AN ALLEGED DELINQUENT CHILD

ENTRY

In the above titled case, let the record show that the said child, Buddy Lynn Whittington, is represented by Attorney Jack Supman and Attorney Judson Kistler.

Robert U. Hastings, Judge of the Juvenile Court.

Juvenile Journal # 13, page 1

Juvenile Docket #9, page 514

Approved:

Jack Supman, Judson C. Kistler.

Filed Aug. 5, 1966. Robert U. Hastings, Juvenile Judge.

IN THE JUVENILE COURT OF FAIRFIELD COUNTY, OHIO

Case No. 6783-J

August 5, 1966.

In the Matter of

BUDDY LYNN WHITTINGTON, AN ALLEGED DELINQUENT CHILD

JOURNAL ENTRY

On this 5th day of August, 1966, appeared Buddy Lynn Whittington, with his mother and father, Orville A. Whittington and Ollie Mae Whittington, and with his counsel, Jack Supman and Judson C. Kistler.

The Complaint alleging that Buddy Lynn Whittington was a delinquent child was read in open Court and counsel for Buddy Lynn Whittington, an alleged delinquent child, moved the Court to grant them additional time for him to answer said Complaint, which motion was sustained by the Court and granted.

By agreement of counsel, the arraignment of said Buddy Lynn Whittington to answer the Complaint heretofore filed against him is continued until 9:30 a.m. August 11th, 1966.

Robert U. Hastings, Judge of the Juvenile Court.

Approved by:

E. Raymond Morehart, Prosecuting Attorney for Fairfield County. Jack Supman, Judson C. Kistler, Counsel for Buddy Lynn Whittington.

Juv. Jour. #13, Page 1

Juv. Doc. #9, Page 514

Filed Aug. 5, 1966. Robert U. Hastings, Juvenile Judge.

IN THE JUVENILE COURT OF FAIRFIELD COUNTY, OHIO

No. 6183-J

In the Matter of

BUDDY LYNN WHITTINGTON, AN ALLEGED DELINQUENT CHILD

MOTION

Now comes the defendant, a minor 14 years of age, by his attorneys, and moves the Court that he be placed in the custody of his parents who are fine law abiding religious individuals pending any further hearing in this said cause, and released from the County Jail where he is now confined for the reason that the defendant is of tender years, he only having reached the age of 14 on the 23rd. day of July, 1966 and for the further reason that there is no detention home in Fairfield County for the confinement of a minor of tender years.

The defendant is at the present time being confined in a small solitary cell without a light where he is secluded from anyone else by reason of nature of the lack of facilities for the confinement of a minor so that the result is, he is confined in conditions worse than what the most hardened mature criminal would be confined in. It is inconceivable and inhumane that this young boy who has never been involved in any trouble be confined in such conditions pending the hearing of this cause. The Juvenile Court and the Grand Juries of Fairfield County for years have all recommended and found necessary the need of a detention home for the confinement of minors and the entire juvenile act is written having in mind what is best for a juvenile and to continue such confinement of this child in these conditions is unconscionable, is a deprivation of rights of any individual or citizen and it is unthinkable for him to be further so confined. Even the most hardened criminal who would be apprehended in this County and no matter what he would be charged with, would not be so confined as this young lad is now being confined.

This Court upon confinement of this minor with his parent's can impose any restrictions and conditions of the

confinement with his parent's as the Court shall see fit and deem proper.

That the physical facilities and the conditions of this confinement as described in this Motion is no reflection on any official but merely on the archaic and middle age facilities.

If for any reason the Court will not release the Defendant to the custody of his parent's then the defendant prays that he be released to the custody of any other proper custodian during the pendency of these proceedings. If for any reason the Court will not release the child to the custody of his parent's or to any other proper or fit custodian while this action is pending then the defendant prays that the court immediately fix a reasonable appearance bond for the defendant.

Jack Supman, Judson C. Kistler, Attorneys for Defendant, Buddy Lynn Whittington, a minor 14 years of age.

Juv. Doc. #9, page 514

Filed Aug. 10, 1966. Robert U. Hastings, Juvenile Judge. 3:30 p.m.

IN THE JUVENILE COURT OF FAIRFIELD COUNTY, OHIO

No. 6183-J

In the Matter of

BUDDY LYNN WHITTINGTON, AN ALLEGED DELINQUENT CHILD

MOTION

Now comes the defendant, a minor 14 years of age, by his counsel and moves the Court that the complaint filed against him be dismissed for the reason that he was improperly arrested in that a complaint was filed against him and a warrant to arrest issued thereon and then later another complaint was filed which was different from the original complaint.

Jack Supman, Judson C. Kistler, Attorneys for Defendant, Buddy Lynn Whittington, a minor 14 years of age.

Juv. Doc. #9, Page 514

Copy mailed to E. Raymond Morehart, Prosecuting Attorney for Fairfield County.

Filed Aug. 10, 1966. Robert U. Hastings, Juvenile Judge. 3:30 p.m.

IN THE JUVENILE COURT OF FAIRFIELD COUNTY, OHIO

No. 6183-J

In the Matter of

BUDDY LYNN WHITTINGTON, AN ALLEGED DELINQUENT CHILD

MOTION

Now comes the defendant, a minor 14 years of age, by his counsel and moves the Court that the complaint filed against him be dismissed for the reason that the entire juvenile court act is unconstitutional and he is charged with a crime and his constitutional rights are thusly being abridged and he is being deprived of his constitutional rights.

Jack Supman, Judson C. Kistler, Attorneys for Defendant, Buddy Lynn Whittington, a minor 14 years of age.

Juv. Doc. #9, Page 514

Copy mailed to E. Raymond Morehart, Prosecuting Attorney for Fairfield County.

Filed Aug. 10, 1966. Robert U. Hastings, Juvenile Judge. 3:30 p.m.

IN THE JUVENILE COURT OF FAIRFIELD COUNTY, OHIO

Case No. 6183-J

In the Matter of

BUDDY LYNN WHITTINGTON, AN ALLEGED DELINQUENT CHILD

JOURNAL ENTRY—ON ARRAIGNMENT PLEA OF "NOT GUILTY"

August 11th, 1966.

This 11th day of August, 1966, came E. Raymond Morehart, Prosecuting Attorney, also came Buddy Lynn Whittington along with his counsel, Jack Supman and Judson C. Kistler, to be arraigned upon a charge of delinquency. Also present were the parents of said child, Orville A. and Ollie Mae Whittington. The charge was distinctly read to Buddy Lynn Whittington and he was required to plead thereto.

Whereupon the said Buddy Lynn Whittington, through his counsel, entered a plea of "not guilty" to said charge.

It is therefore ordered by the Court that said case be set for hearing on the 24th day of August, 1966, at 9:30 o'clock a.m.

Robert U. Hastings, Judge of the Juvenile Court.

Approved:

E. Raymond Morehart, Prosecuting Attorney.

Juv. Jour. #13, Page 2.

Juv. Doc. #9, Page 514.

Filed Aug. 11, 1966. Robert U. Hastings, Juvenile Judge.

IN THE JUVENILE COURT OF FAIRFIELD COUNTY, OHIO

No. 6183-J

In the Matter of

BUDDY LYNN WHITTINGTON, AN ALLEGED DELINQUENT CHILD

MOTION

Now comes the defendant, a minor 14 years of age, by his counsel and moves the Court to suppress any evidence of statements purportedly made by the defendant for the reason that the defendant only became 14 years of age on the 23rd. day of July, 1966 and that he was not represented by counsel when interrogated by law enforcement officers and representatives, his rights were not explained to him and he was not old enough to be able to appreciate and understand the interrogation and the accusations being made against him, so that defendant respectfully requests the Court to suppress any such evidence in any proceedings before this said Court.

Jack Supman, Judson C. Kistler, Attorneys for Defendant, Buddy Lynn Whittington, a minor 14 years of age.

Juv. Doc. #9, Page 514.

Copy mailed to E. Raymond Morehart, Prosecuting Attorney for Fairfield County.

Filed Aug. 12, 1966. Robert U. Hastings, Juvenile Judge. 1:45 p.m.

IN THE JUVENILE COURT OF FAIRFIELD COUNTY, OHIO

No. 6183-J

In the Matter of

BUDDY LYNN WHITTINGTON, AN ALLEGED DELINQUENT CHILD

MOTION

Now comes the defendant, Buddy Lynn Whittington, a minor 14 years of age he having become fourteen years of age on the 23rd. day of July, 1966 and again moves the Court as follows:.

1. That the defendant be admitted to bond in a reasonable amount as fixed by the Court or that defendant be immediately released to the custody of his parents pending trial as provided in Revised Code Section 2151.31 or that he be sent to the Franklin County Detention Home while awaiting trial in this cause for the following reasons:.

First, This cause was originally set for trial on Thursday, August 11th., 1966 at which time the Prosecutor requested a continuance. The case was then set for trial on August 24th., 1966 at 9:30 o'clock A. M. and yesterday, August 23rd., 1966 at 4:45 o'clock P. M., after the Court House was closed the Secretary to the Prosecutor called the Secretary of one of the defendant's attorneys and said that the trial was continued to August 31st., 1966 and at that time the Secretary to one of the defendant's counsel stated that there was already a trial set in the Common Pleas Court of Fairfield County, Ohio, styled Smith vs. Smith and said trial had been set for some time.

Second, As was stated when the defendant was first confined, he is a minor of tender years and is being confined in solitary confinement in a cell without a light where he is secluded from anyone else and it constitutes such a solitary confinement that even the most hardened adult criminal is not subjected to.

Third, The defendant in this case has never been involved in any trouble in any way, enjoys a good reputation in the community, has been a law abiding young boy in the community and if the Court desires, defendant will bring into Court as many as twenty-five witnesses consisting of a

minister, school teacher and reputable citizens of the community as to this boy's character and good behavior.

Fourth, The parents of the defendant are fine religious, law abiding, christian folks and it will be noted in the record that the Prosecutor at one time stated that they were fine people and the Father of the defendant is retired and no one else lives in the Whittington home except the Father and the Mother of defendant and if the defendant is released to their custody they will devote twenty-four hours a day to being with their son as the Father is retired so that there is no reason in the world to keep this boy confined in any way pending this trial.

Fifth, That if the Court desires and as has been offered before, the defendant will produce Ross M. Bleak, M. D., 3545 Olentangy River Road, Columbus, Ohio, whose professional qualifications are as follows:

Bachelor of Science, University of Utah, 1944
Doctor of Medicine, University of Utah, 1947
Internship, Grasslands Hospital, Valhalla, N. Y., 1947-48
Psychiatric Residency, Kings County Hospital, Brooklyn, N. Y., 1948-50
Fellow in Child Psychiatry, Philadelphia Child Guidance Clinic, Philadelphia, Pa., 1950-51
Post-Graduate Education—Graduate School of Psychiatry, State University of New York, College of Medicine, 1948-50
Staff Psychiatrist, Federal Reformatory for Boys, Chillicothe, O., 1951-53
Consulting Psychiatrist, Children's Mental Health Center, Columbus, O. 1953-57
Consulting Psychiatrist, Juvenile Diagnostic Center, Columbus, O., 1952-1963
Instructor in Psychiatry, Ohio State University, College of Medicine, 1953-1955
Private Practice of Psychiatry, Columbus, Ohio, 1953 to present.
Diplomat of the American Board of Psychiatry and Neurology, 1954
Fellow of the American Psychiatric Association, 1964.

who has examined the boy and will testify that his health and well-being demands that he be released immediately

from solitary confinement and that there is no risk or any danger of any kind in this boy being released to the custody of his parents.

Sixth, That the Court can if it so wishes impose any kind of restrictions as the Court should see fit or proper upon the parents if the child is released to them.

Seventh, That the physical and mental health of this boy is being endangered by continuously keeping him in solitary confinement in a small, iron-barred cell while at the same time in a Shepard case in Cleveland an adult who was once convicted of murdering his wife which judgment has now been vacated and in which case another trial is pending to-wit: the Shephard case, is allowed to be out on bond by virtue of a ruling of the Federal Courts of the United States.

Eighth, That the defendant in this case does now and always has denied any knowledge of the death of Gladys Willard and did deny any knowledge of same when he was questioned by police officers and others for several hours without having been advised as to his rights as guaranteed by the case of Miranda v. State of Arizona, June 13, 1966, 86 S. Ct. 1602 and the case of Johnson v. State of New Jersey, June 20, 1966, 86 S. Ct. 1772.

Ninth, That the continuances in this cause were not due to any fault of the defendant as he was ready when the matter was originally set on August 11th., 1966 and to subject him to such inhumane solitary confinement such as has never been heard of before for a minor of this age is unthinkable and inhumane and such confinement as not even a stray dog receives in the County of Fairfield, State of Ohio. As in the new dog shelter home a dog is allowed to be out in the air and in the light and not just confined indoors behind iron bars in a small area and no reflection is being made in any way upon the personnel of the local sheriff's office who are without proper physical facilities for the confinement of a minor.

Finally, defendant, Buddy Lynn Whittington, is requesting an immediate hearing on this Motion and also the opportunity to bring in witnesses to establish the foregoing.

Jack Supman, Judson C. Kistler, Attorneys for Defendant, Buddy Lynn Whittington, a minor 14 years of age.

MEMORANDUM

R. C. 2151.31 Custody of child pending hearing; child may be fingerprinted, provides in part as follows:

> "Whenever any officer takes a child into custody, he shall, unless it is impracticable or has been otherwise ordered by the juvenile court, *accept the written promise of the parent, guardian, or custodian to bring the child to the court at the time fixed.* Thereupon such child may be released in the custody of a parent, guardian, or custodian. . . ."

R. C. 2151.26 Child charged with felony, provides in part as follows:

> "In any case involving a delinquent child under sections 2151.01 to 2151.45, inclusive, of the Revised Code, who has committed an act which could be a felony if committed by an adult, the juvenile judge, after full investigation and after a mental and physical examination of such child has been made by the bureau of juvenile research, or by some other public or private agency, or by a person qualified to make such examination, may order *that such child enter into a recognizance with good and sufficient surety, subject to the approval of the judge,* for his appearance before the court of common pleas at the next term thereof. . . ."

R. C. 2151.34 Place of detention for children, provides in part as follows:

> "No child under eighteen years of age shall be placed *in or committed to any prison, jail, or lockup, nor shall such child be brought* into any police station, vehicle, . . ."

The United States Supreme Court has ruled that the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates use of procedural safeguards effective to secure the privilege against self-incrimination. The Court went on to hold that unless other effective means would be devised, prior to any questioning a person must be warned that he may remain silent, that

any statement he makes may be used as evidence, and that he has a right to the presence of an attorney, either retained or appointed. Miranda v. State of Arizona, June 13, 1966, 86 S. Ct. 1602.

Escobedo v. State of Illinois.

Juv. Doc. #9, Page 514

Copy mailed to E. Raymond Morehart, Prosecuting Attorney for Fairfield County.

Filed Aug. 24, 1966. Robert U. Hastings, Juvenile Judge. 1 o'clock P. M.

IN THE JUVENILE COURT OF FAIRFIELD COUNTY, OHIO

Case No. 6183-J

In the Matter of

BUDDY LYNN WHITTINGTON, AN ALLEGED DELINQUENT CHILD

ENTRY

This cause came on for hearing this 11th day of August, 1966, on motion of defendant that the Court order his release to the custody of his parents and, if not released to his parents then the defendant to be released to the custody of any other proper custodian during the pendency of this cause and, if not released to the parents or some other custodian, that the Court immediately fix a reasonable appearance bond for the defendant.

The Court, after hearing argument of counsel for the defendant, the Prosecuting Attorney and, upon due consideration of all that had been presented, finds said motion should be, and the same hereby is, overruled. Exceptions saved to the defendant.

Robert U. Hastings, Judge.

Approved:

E. Raymond Morehart, Prosecuting Attorney. Jack Supman, Judson C. Kistler, Counsel for Buddy Lynn Whittington.

Juv. Jour. #13, Page 2

Juv. Doc. #9, Page 514

Filed Aug. 25, 1966. Robert U. Hastings, Juvenile Judge.

IN THE JUVENILE COURT OF FAIRFIELD COUNTY, OHIO

Case No. 6183-J

In the Matter of

BUDDY LYNN WHITTINGTON, AN ALLEGED DELINQUENT CHILD

ENTRY

This cause came on for hearing this 11th day of August, 1966, on the motion of the defendant to dismiss the complaint heretofore filed against him for the reason that he was improperly arrested.

The Court, after hearing argument of counsel for the defendant and the Prosecuting Attorney, finds said motion not to be well taken and that the same should be, and hereby is, overruled. Exceptions saved to the defendant.

Robert U. Hastings, Judge.

Approved:

E. Raymond Morehart, Prosecuting Attorney. Jack Supman, Judson C. Kistler, Counsel for Buddy Lynn Whittington.

Juv. Jour. #13, Page 2

Juv. Doc. #9, Page 514

Filed Aug. 25, 1966. Robert U. Hastings Juvenile Judge.

IN THE JUVENILE COURT OF FAIRFIELD COUNTY, OHIO

Case No. 6183-J

In the Matter of

BUDDY LYNN WHITTINGTON, AN ALLEGED DELINQUENT CHILD

ENTRY

This cause came on for hearing this 11th day of August, 1966, on the motion of the defendant to dismiss the complaint against him for the reason that the entire Juvenile Court act is unconstitutional and that the defendant is being deprived of his constitutional right.

The Court, after hearing argument of counsel for the defendant and the Prosecuting Attorney, finds said motion not to be well taken and that the same should be overruled.

It is therefore ordered that the motion of the defendant to dismiss the complaint for the reason that the entire juvenile court act is unconstitutional, be, and the same hereby is, overruled. Exceptions saved to the defendant.

Robert U. Hastings, Judge.

Approved:

E. Raymond Morehart, Prosecuting Attorney. Jack Supman, Judson C. Kistler, Counsel for Buddy Lynn Whittington.

Juv. Jour. #13, Page 2

Juv. Doc. #9, Page 514

Filed Aug. 25, 1966. Robert U. Hastings, Juvenile Judge.

IN THE JUVENILE COURT OF FAIRFIELD COUNTY, OHIO

Case No. 6183-J

In the Matter of

BUDDY LYNN WHITTINGTON, AN ALLEGED DELINQUENT CHILD

REQUEST

To the Official Court Reporter:

Please type the record of the testimony and proceedings of the hearing in the above mentioned case which hearing was held on Thursday, August 25th., 1966 on the Motion of the Defendant, Buddy Lynn Whittington, requesting the Court to fix bond or release him to his parents pending trial or send him to the Franklin County Detention Home pending trial, for defendant.

Jack Supman, Judson C. Kistler, Attorneys for Defendant, Buddy Lynn Whittington.

Juv. Doc. #9, Page 514

Filed Aug. 26, 1966. Robert U. Hastings, Juvenile Judge. Filed 10:29 A.M.

IN THE JUVENILE COURT OF FAIRFIELD COUNTY, OHIO

Case No. 6183-J

In the Matter of

BUDDY LYNN WHITTINGTON, AN ALLEGED DELINQUENT CHILD

REQUEST

Now comes the defendant and requests that an official court reporter take a record of all evidence and all the proceedings in the hearing in this cause set for Friday, September 2nd., 1966 at nine o'clock A.M.

Jack Supman, Judson C. Kistler, Attorneys for Defendant, Buddy Lynn Whittington, a minor 14 years of age.

Juv. Doc. #9, Page 514

Filed Aug. 30, 1966. Robert U. Hastings, Juvenile Judge. 8:20 A.M.

Copy mailed to E. Raymond Morehart, Prosecuting Attorney for Fairfield County.

IN THE JUVENILE COURT OF FAIRFIELD COUNTY, OHIO

Case No. 6183-J

In the Matter of

BUDDY LYNN WHITTINGTON, AN ALLEGED DELINQUENT CHILD

ENTRY

This cause came on for hearing this 25th day of August, 1966, on the motion of the defendant, Buddy Lynn Whittington, to be admitted to bond in a reasonable amount to be fixed by the Court or that he be released to the custody of his parents pending trial or that he be sent to the Franklin County Detention Home while awaiting trial in this cause, the evidence of witnesses in support thereof and arguments of counsel.

The Court, after hearing the evidence adduced in behalf of said motion and after hearing arguments of counsel, finds said motion not to be well taken and that the same should be denied.

It is therefore the order of this Court that the motion of the defendant as set forth above be, and the same hereby is denied. Exceptions saved to the defendant.

Robert U. Hastings, Judge.

Approved:

E. Raymond Morehart, Prosecuting Attorney. Jack Supman, Judson C. Kistler, Attorneys for Defendant.

Juv. Jour. #13, Page 3

Juv. Doc. #9, Page 514

Filed Sep. 1, 1966. Robert U. Hastings, Juvenile Judge. 9:50 A.M.

IN THE JUVENILE COURT OF FAIRFIELD COUNTY, OHIO

Case No. 6183-J

In the Matter of

BUDDY LYNN WHITTINGTON, AN ALLEGED DELINQUENT CHILD

ENTRY

This cause having been set for hearing at 9:30 A.M., on August 24, 1966, and for good cause shown by the prosecution that essential witnesses were out of the jurisdiction of the Court and could not be present, it is ordered that said cause be continued.

It is further ordered, and with agreement of counsel, that the trial of this cause is set for 9:00 A.M., September 2, 1966.

Robert U. Hastings, Judge.

Approved:

E. Raymond Morehart, Prosecuting Attorney. Jack Supman, Judson C. Kistler, Attorneys for Defendant.

Juv. Jour. #13, Page 3

Juv. Doc. #9, Page 514

Filed Sep. 1, 1966. Robert U. Hastings, Juvenile Judge. 9:50 A.M.

IN THE JUVENILE COURT OF FAIRFIELD COUNTY, OHIO

Case No. 6183-J

In the Matter of

BUDDY LYNN WHITTINGTON, AN ALLEGED DELINQUENT CHILD

MOTION

Now comes the Defendant herein through his counsel and renews the Motion to dismiss the proceedings against him by reason of the fact of the unconstitutionality of the Juvenile Code Provisions of Ohio.

The Juvenile Statutes as presently constituted deprive this Defendant of his constitutional rights to a fair and impartial trial. That the manner in which the statutes are presently constituted and out of necessity have to be administered by this Court, the Court's self appointed investigating officer was called by the Court to investigate this minor Defendant for an offense which may or may not have been committed by this Defendant which this Defendant does deny, but which subsequently did result in a charge. That the statutes as constituted require the investigation officer to submit facts to the Judge of this Court as a basis and grounds for issuing a warrant and a complaint for an arrest of the same Defendant who will be tried by the same Judge. Thusly and in consequence thereto, these statutes do not in any manner permit any Court who has heard facts to be the basis of an arrest, to be able to render a fair and impartial decision. In fact, such as in this case, the officer of the Court not only made the investigation but failed to acquaint the Defendant with his Constitutional Rights, that he was entitled to an attorney, to remain quiet and that any statements he made would or could be used against him.

That now when this very same question will be presented to the same Court on a Motion to suppress the evidence and there will be testimony by the same investigating officer who under the statute must be appointed by the hearing Judge, as to the merits of this Motion. That the same investigating officer who will testify has been permitted to remain in Court to hear all of the Motions

and testimony which Court is under the complete control and supervision of a Judge as provided by the statutes, whereas actually the Judge does have control and did exercise control of his Court and excluded others but did allow the investigating officer to remain in the Court Room when he will be called later as a prosecuting witness.

That under the circumstances as recited and as provided by the Statutes, a Judge under these Statutes is placed in this compromising position. That this Court has now to pursue under the Statutes in this case to hear this cause after having previously heard the claims of the Prosecution and his own investigating officer. It is submitted that in a serious felony charge which according to the Statutes would authorize the Judge to find this boy a delinquent and possibly bind him over to the Grand Jury with the resulting publicity that he has already been found guilty of committing the offense with the resulting noteriety so as to deprive him of a fair and impartial trial according to the standards as layed down by the Federal Court in the recent Sheppard Case.

Wherefore, it is again submitted that the Statutes which put the Defendant and any Court in this situation in light of the Supreme Court and other Court Rulings out of necessity has to be declared unconstitutional as an abridgment of the rights of this Defendant to a fair, speedy and impartial trial.

Jack Supman, Judson C. Kistler, Attorneys for Defendant, Buddy Lynn Whittington.

Juv. Doc. #9, Page 514

Filed Sep. 2, 1966. Robert U. Hastings, Juvenile Judge. 8:20 A.M.

IN THE JUVENILE COURT OF FAIRFIELD COUNTY, OHIO

Case No. 6183-J

In the Matter of

BUDDY LYNN WHITTINGTON, AN ALLEGED DELINQUENT CHILD

MOTION

Now comes the Defendant Buddy Lynn Whittington, a minor 14 years of age and again moves the Court that an official Court Reporter be employed to take the testimony in any further hearings in this said cause, and suggests that Alvin A. Omsberg, the official Court Reporter of the Common Pleas Court or a reporter from the firm of Armstrong and Oakey or some other firm of accredited reporters be employed to take the testimony and the proceedings so that during the course of any further proceedings if a question is asked to be read back that the same can be done and also so that the testimony can be typed and transcribed after the same is taken.

Jack Supman, Judson C. Kistler, Attorneys for Defendant.

Juv. Doc. #9, Page 514

Filed Sep. 2, 1966. Robert U. Hastings, Juvenile Judge. 8:20 A.M.

IN THE JUVENILE COURT OF FAIRFIELD COUNTY, OHIO

Case No. 6183-J

In the Matter of

BUDDY LYNN WHITTINGTON, AN ALLEGED DELINQUENT CHILD

MOTION

Now comes the Defendant Buddy Lynn Whittington, a minor 14 years of age, and moves the Court that this said complaint and this entire proceedings filed against him in this said cause be dismissed for the following reasons:

1. The Defendant has been confined for a period of 27 days, to wit since August 5, 1966, in solitary confinement in an iron cell and cage, all as forbidden by the Constitution of the United States, the Constitution of the State of Ohio, the Federal Decisions and the Revised Code of the State of Ohio and the Civil Rights Act, all of which forbidden cruel and inhuman punishment being inflicted upon any individual, and especially where a minor who has only reached the age of 14 on July 23, 1966, so that the rights of this minor as guaranteed by everything that we stand for and the legal system of jurisprudence of the United States and the State of Ohio, have been taken from this minor Defendant.

2. The Defendant has been refused Bond even after various Motions and Requests have been made by the Defendant for the fixing of the same and even after a hearing was had in the Court, in which a large number of witnesses testified including a minister, a schoolteacher, a Sunday School Superintendent, neighbors of the Defendant and others, all of whom established that there was absolutely no reason for the holding of this boy in solitary confinement in the iron cage that he is now being held in and in which hearing no evidence was offered whatsoever to give any indication that the boy should be so held or that there was any risk in any way in releasing the boy to Bond or to his parents, and it was established that the parents were

fine Christian folks who would spend every moment of their time with the boy if he was released and in which hearing it was indicated by everyone including the Prosecutor that the parents of the minor Defendant were fine Christian people, as is the Defendant, who has never been in any kind of trouble whatsoever.

3. The Defendant has been deprived of his Constitutional Rights in that at the beginning of the hearing he requested a Court Reporter to take all the testimony, meaning a reporter who could read back the questions and then type up the record and such was not granted to him.

4. The Defendant in this case was deprived of rights in that he was examined by an official of this Court and by other law enforcement officers and subjected to gruelling interrogation for a period of several hours without first being advised of his rights which are:

(1) He must be informed "in clear and unequivocal terms that he has the right to remain silent."

(2) The warning of the right to remain silent must be accompanied by an explanation that anything he says can and will be used against him in Court.

(3) He must be warned not only that he has the right to counsel but also that if he is indigent a lawyer will be appointed to represent him.

(4) If he indicates "in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease."

5. At a hearing in this Court on the 24th day of August 1966, testimony was given and then the Defendant requested, by a written request, that the testimony and the record of the proceedings be typed up so that the same would be available for him at a hearing on Friday, September 2, 1966. On Wednesday, August 31, 1966, in the late afternoon, the Defendants Attorney called the official Court Reporter as to when the testimony and proceedings and the record would be ready and

was informed that she had not proceeded to type the same because she had not been instructed to do so by the Court.

6. That this cause be dismissed for the reason that the Defendant has not been granted a speedy trial as contemplated by the Revised Code of the State of Ohio, the Constitution of the United States and the State of Ohio and the Decisions of the Federal Court. The Defendant was arrested and confined on Friday, August 5, 1966; the arrangement was set for 2:00 P.M. at the same time a request was made for a continuance until Monday or Tuesday, August 8th or 9th since the Court House was closed on Saturday, August 6, 1966; the Prosecutor was unable to be present at any hearing until August 11, 1966 at 9:00 A.M. On August 11, 1966, the Defendant and his counsel appeared and were ready for the hearing and the Prosecutor stated to the Court that he was not ready to proceed with the hearing and evidence and again asked for a continuance at which time the Defendant objected to the continuance unless the Defendant would be released on Bond or in the custody of his parents. The Prosecutor then notified the Court that the matter could not be held until August 18, 1966, at which time the Defense Counsel would be out of town and had so notified the Court in writing over two months prior. The matter was then set for August 24, 1966 at 9:00 A.M. The Defendant again renewed his Motion to be released on Bond or to be sent some suitable place other than the solitary cell in which he was being incarcerated and which Motion was again denied. It was then approximately nine days from August 11, 1966, before the Prosecutor filed a Precipe for a necessary witness, a doctor who was the pathologist in this case in an adjoining County after which the Precipe was then sent by Certified Mail. That the said doctor had still not been notified on August 22, 1966, that he was to be in Court on August 24, 1966, and this was the reason given by the Prosecutor why the hearing could not be then held on August 24, 1966. In fact it was between 4:30 and 4:45 on August 23, 1966, that the Defendant or his Counsel was notified that the hearing would not

be held on August 24, 1966. The Defendant again renewed his Motion and presented testimony by a large number of witnesses without contradiction that the Defendant should be put out on Bond or in the custody of his parents. Listening to all this evidence the Court without any evidence being offered to oppose the Motion whatsoever, denied the Motion.

7. That the cruel and inhuman solitary confinement in an iron cage that this Defendant has been subjected to, has already done him irreparable harm and to continue to keep him so cruelly and inhumanly confined can only lead to insanity or some other grievous result from which this 14 year old boy will never recover.

Jack Supman, Judson C. Kistler, Attorneys for Defendant.

Juv. Doc. #9, Page 514

Filed Sep. 2, 1966. Robert U. Hastings, Juvenile Judge. 8:20 A.M.

IN THE JUVENILE COURT OF FAIRFIELD COUNTY, OHIO

Case No. 6183-J

In the Matter of

BUDDY LYNN WHITTINGTON, AN ALLEGED DELINQUENT CHILD

ENTRY

This cause came on for hearing this 2nd day of September, 1966, on the motion of the defendant to suppress any evidence of statements purportedly made by the defendant for the reason that the defendant only became 14 years of age on the 23rd day of July, 1966 and that he was not represented by counsel when interrogated by law enforcement officers and representatives, his rights were not explained to him and he was not old enough to be able to appreciate and understand the interrogation and the accusations being made against him, so that defendant requests the Court to suppress any such evidence in any proceedings before said Court.

The Court, after hearing arguments of counsel, finds said motion should be, and the same hereby is, denied. Exceptions saved to the defendant.

Robert U. Hastings, Judge.

Approved:

E. Raymond Morehart, Prosecuting Attorney. Jack Supman, Judson C. Kistler, Attorneys for defendant, Buddy Lynn Whittington.

Juv. Jour. #13, Page 4

Juv. Doc. #9, Page 514

Filed Sep. 7, 1966. Robert U. Hastings, Juvenile Judge. 2:30 P.M.

IN THE JUVENILE COURT OF FAIRFIELD COUNTY, OHIO

Case No. 6183-J

In the Matter of

BUDDY LYNN WHITTINGTON, AN ALLEGED DELINQUENT CHILD

ENTRY

This cause came on for hearing this 2nd day of September, 1966, on the Motion of the defendant to dismiss the proceedings against the defendant for the reason that the Juvenile Code Provisions of the Revised Code of the State of Ohio are unconstitutional.

The Court, after hearing arguments of counsel, finds that said motion is not well taken and that the same should be, and it hereby is, denied. Exceptions saved to the defendant.

Robert U. Hastings, Judge.

Approved:

E. Raymond Morehart, Prosecuting Attorney. Jack Supman, Judson, Attorneys for defendant, Buddy Lynn Whittington.

Juv. Jour. #13, Page 4

Juv. Doc. #9, Page 514

Filed Sep. 7, 1966. Robert U. Hastings, Juvenile Judge. 2:30 P.M.

IN THE JUVENILE COURT OF FAIRFIELD COUNTY, OHIO

Case No. 6183-J

In the Matter of

BUDDY LYNN WHITTINGTON, AN ALLEGED DELINQUENT CHILD

ENTRY

This cause came on for hearing on this 2nd day of September on the motion of the defendant for the Court to employ an official Court Reporter to take the testimony in any further hearings in this said cause and suggested that Alvin A. Omsberg, the Official Court Reporter of the Common Pleas Court or a reporter from the firm of Armstrong and Oakey or some other firm of accredited reporters to take the testimony and the proceedings. The Court, after hearing comments and arguments of counsel, and after advising counsel that the Court had an official reporter, finds that said motion should be, and the same hereby is, denied. Exceptions saved to the defendant.

Robert U. Hastings, Judge.

Approved:

E. Raymond Morehart, Prosecuting Attorney.

Submitted but not Approved:

Jack Supman, Judson C. Kistler, Attorneys for Defendant, Buddy Lynn Whittington.

Juv. Jour. #13, Page 4

Juv. Doc. #9, Page 514

Filed Sep. 7, 1966. Robert U. Hastings, Juvenile Judge. 2:30 P.M.

IN THE JUVENILE COURT OF FAIRFIELD COUNTY, OHIO

Case No. 6183-J

In the Matter of

BUDDY LYNN WHITTINGTON, AN ALLEGED DELINQUENT CHILD

ENTRY

This cause came on for hearing this 2nd day of September, 1966, on the Motion of the defendant to dismiss the complaint and the entire proceedings against the defendant for the reasons that he had been confined for a period of 27 days, that he was refused bond, that he was deprived of his Constitutional rights, that he has not been granted a speedy trial, et al.

The Court, after hearing arguments and comments of counsel, finds that said motion is not well taken and that the same should be, and hereby is, overruled and denied. Exceptions saved to the defendant.

Robert U. Hastings, Judge.

Approved:

E. Raymond Morehart, Prosecuting Attorney.

Submitted but not Approved:

Jack Supman, Judson C. Kistler, Attorneys for Defendant, Buddy Lynn Whittington.

Juv. Jour. #13, Page 4

Juv. Doc. #9, Page 514

Filed Sep. 7, 1966. Robert U. Hastings, Juvenile Judge. 2:30 P.M.

IN THE JUVENILE COURT OF FAIRFIELD COUNTY, OHIO

Case No. 6183-J

In the Matter of

BUDDY LYNN WHITTINGTON, AN ALLEGED DELINQUENT CHILD

APPLICATION

Now comes the Defendant herein, by his attorneys, and respectfully requests approval of this Court for permission to have the parents of the said child take this Defendant to attend the funeral for the Defendant's grandfather, which funeral will be held September 7, 1966. That the said parents will be responsible for the picking up, and for the return of said minor to the County Jail.

Jack Supman, Judson C. Kistler, Attorneys for said Minor, Defendant herein.

Juv. Doc. #9, Page 514

Filed Sep. 7, 1966. Robert U. Hastings, Juvenile Judge.

ENTRY

Upon Application of the Attorneys for said Minor herein, for approval to have said minor attend the funeral of his grandfather, September 7, 1966, the Court hereby approves said Application, and authorizes said parents to take said minor from the County Jail at 11:00 A.M., September 7, 1966, hold him in their custody, and return him at 7:00 P.M., September 7, 1966.

Robert U. Hastings, Judge of said Court.

Approved:

Jack Supman, Judson C. Kistler, Attorneys for said Minor, Defendant herein.

Juv. Jour. #13, Page 4

Juv. Doc. #9, Page 514

Filed Sep. 7, 1966. Robert U. Hastings, Juvenile Judge.

IN THE JUVENILE COURT OF FAIRFIELD COUNTY, OHIO

Case No. 6183-J

In the Matter of

BUDDY LYNN WHITTINGTON, AN ALLEGED DELINQUENT CHILD

ENTRY

On the 2nd day of September, 1966, appeared E. Raymond Morehart and S. Farrell Jackson, Prosecuting Attorneys on behalf of the State of Ohio; also appeared Buddy Lynn Whittington, an alleged delinquent child, with his parents, O. A. Whittington and Ollie Whittington, father and mother, and his attorneys, Judson C. Kistler and Jack Supman.

The said Buddy Lynn Whittington, a minor child of the age of 14 years, being brought before the Court, this cause came on to be heard on the compaint, and it appearing that all citations and warrants have been served and that all persons interested are now before the Court, and the Court having heard all of the evidence and being fully advised in said premises, finds that said Buddy Lynn Whittington is a minor under the age of eighteen years, fourteen years of age, and is a delinquent child as set forth in the complaint, and that said Buddy Lynn Whittington has committed an act which would be a felony if committed by an adult.

It is therefore ordered by the Court, pursuant to Section 2151.26 of the Revised Code of the State of Ohio, that William Rutherford, the Juvenile Probation Officer, make a full investigation herein and report the same to this Court. It is further ordered that said Buddy Lynn Whittington, a delinquent child, be committed to the Juvenile Diagnostic Center of the Ohio Youth Commission for a complete mental and physical examination, the results of which are to be forwarded to this Court. And this cause is continued pending investigation and the findings of the mental and physical examination. Exceptions saved to the defendant.

Judge Robert U. Hastings, Judge.

Approved:

E. Raymond Morehart, Prosecuting Attorney. S. Farrell Jackson, Assistant Prosecuting Attorney.

Submitted to But Not Approved:

Jack Supman, Judson C. Kistler, Attorneys for Defendant.

Juv. Jour. #13, Page 4

Juv. Doc. #9, Page 514

Filed Sep. 7, 1966. Robert U. Hastings, Juvenile Judge. 2:30 P. M.

Warrant to Convey

Rev. Code, Secs. 2151.35, .36

Juvenile Court

The State of Ohio, Fairfield County, ss.

To: William M. Rutherford, Probation Officer, Fairfield County, Ohio.

Greeting:

Whereas, Buddy Lynn Whittington, having been ordered by the Juvenile Court of said County, to be committed to Ohio Youth Commission, temporary commitment at Columbus, Ohio; you are hereby commanded forthwith to take charge of and convey said Buddy Lynn Whittington to said Ohio Youth Commission.

After executing this warrant you shall make due return thereof to this office.

Witness my signature and seal of said Court, this 12th day of September 1966

Robert U. Hastings, Judge of the Juvenile Court.
By Ruth Ann Jackson, Deputy Clerk.

The Ohio Youth Commission, Columbus, Ohio, September 12th, 1966.

Received this day of William M. Rutherford the person named in the above warrant.

Sherry Lewis—Intake.

Return

Fairfield County, Ohio. September 12th 1966

Received the within Writ on the 12th day of September 1966 and on the 12th day of September 1966 I executed it by conveying the person named to the place designated, and I delivered him into the custody of the Sherry Lewis, Intake of said Ohio Youth Commission as shown by the receipt indorsed within.

Wm. Rutherford.

Filed Sep. 12, 1966. Robert U. Hastings, Juvenile Judge.

No. 6183 J

Juv. App. Doc. 9 Page 514

JUVENILE COURT, FAIRFIELD COUNTY, OHIO

In the Matter of

BUDDY LYNN WHITTINGTON

WARRANT TO CONVEY

Returned and Filed, ——, ——, 19 —.

——, ——, Judge of the Juvenile Court. ——, ——, Deputy Clerk.

IN THE JUVENILE COURT OF FAIRFIELD COUNTY, OHIO

No. 6183-J

In the Matter of

BUDDY LYNN WHITTINGTON, AN ALLEGED DELINQUENT CHILD

NOTICE OF APPEAL

Buddy Lynn Whittington, a minor 14 years of age, defendant-appellart, gives Notice of his Appeal to the Court of Appeals of Fairfield County, Ohio, from the order and final judgment made and entered herein in the above entitled cause on the 7th. day of September, 1966 whereby the Court found the defendant to be a delinquent child as set forth in the complaint. Said Appeal is on questions of law.

Jack Supman, Judson C. Kistler, Attorneys for Defendant-Appellant, Buddy Lynn Whittington, a minor 14 years of age

Copy mailed to E. Raymond Morehart, Prosecuting Attorney for Plaintiff-Appellee, this 12th. day of September, 1966.

Jack Supman, Judson C. Kistler, Attorneys for Defendant-Appellant, Buddy Lynn Whittington, a minor 14 years of age

Juv. Doc. #9, Page 514

Filed Sep. 12, 1966. Robert U. Hastings, Juvenile Judge. 3:10 P. M.

IN THE JUVENILE COURT OF FAIRFIELD COUNTY, OHIO

No. 6183-J

In the Matter of

BUDDY LYNN WHITTINGTON, AN ALLEGED DELINQUENT CHILD

REQUEST FOR PREPARATION OF BILL OF EXCEPTIONS

To the Juvenile Judge, to the Official Court Reporter and to the Assistant Court Reporter:

Please prepare and file a Bill of Exceptions in the above mentioned case for use in the Court of Appeals of Fairfield County, Ohio.

Jack Supman, Judson C. Kistler, Attorneys for Defendant-Appellant, Buddy Lynn Whittington, a minor 14 years of age

Juv. Doc. #9, Page 514. Filed Sep. 12, 1966. Robert U. Hastings, Juvenile Judge.

3:10 P.M.

IN THE JUVENILE COURT OF FAIRFIELD COUNTY, OHIO

No. 6183-J

In the Matter of

BUDDY LYNN WHITTINGTON, AN ALLEGED DELINQUENT CHILD

PRECIPE FOR TRANSCRIPT

To the Clerk of the Juvenile Court:

Please prepare and file with the Court of Appeals of Fairfield County, Ohio, a transcript of the docket and journal entries together with all the original papers in the above entitled cause.

Jack Supman, Judson C. Kistler, Attorneys for Defendant-Appellant, Buddy Lynn Whittington, a minor 14 years of age

Juv. Doc. #9, Page 514

Filed Sep. 12, 1966. Robert U. Hastings, Juvenile Judge. 3:10 P. M.

IN THE JUVENILE COURT OF FAIRFIELD COUNTY, OHIO

No. 6183-J

In the Matter of

BUDDY LYNN WHITTINGTON, AN ALLEGED DELINQUENT CHILD

BILL OF EXCEPTIONS

Date of the Overruling or Decision September 7, 1966

Date of Filing of Notice of Appeal September 12, 1966

Exceptions Filed with Clerk of Trial Court October 19, 1966

Robert U. Hastings, Clerk

By Ruth Ann Jackson, Deputy

Notice of Filing October 20, 1966

(By the Clerk to adverse party or his attorney, FORTHWITH after filing)

I, as adverse party to this bill of exceptions, hereby consent to immediate transmission of the same to the Trial Judge.

Jack Supman, 10/31/66.
Judson C. Kistler, 10/31/66.
E. Raymond Morehart,
10/31/66.
Prosecuting Attorney.

OBJECTIONS OR AMENDMENTS TO THE EXCEPTIONS:

(Must be in TEN DAYS after said notice - R.C. 2321.06)

By ——, ——. 19—

By ——, ——. 19—

By ——, ——. 19—

Transmitted to Trial Judge 19—

(Must be either 1, ON EXPIRATION of time for filing objections or amendments, or within FIVE DAYS thereafter; or 2, IMMEDIATELY on filing of the bill if the consent of the adverse party be endorsed as above indicated.) Signature of trial judge may be dispensed with as provided in R.C. 2321.12.

Received 10/31/66. Robert U. Hastings, Trial Judge.

Allowed 10/31/66. Robert U. Hastings, Trial Judge.

Transmitted back to Clerk 10/31/66. Robert U. Hastings, Trial Judge.

Received again by Clerk 10/31/66.

Filed in Court of Appeals of Fairfield County, Ohio, October 31, 1966.

Isaac Rowles, Clerk.
By Karen M. Smith, Deputy.

[Tr. 1-2] IN THE JUVENILE COURT OF FAIRFIELD COUNTY, OHIO

No. 6183-J

In the Matter of

BUDDY LYNN WHITTINGTON, AN ALLEGED DELINQUENT CHILD

HEARING ON MOTION

Date: August 25, 1966

Before: Hon. ROBERT U. HASTINGS, Judge.

APPEARANCES:

For the State of Ohio: E. Raymond Morehart, Prosecuting Attorney, Fairfield County, Ohio.

For the Defendant: Judson C. Kistler, Attorney at Law, 124½ W. Main Street, Lancaster, Ohio; and Jack Supman, Attorney at Law, 124½ W. Main Street, Lancaster, Ohio.

[Tr. 3] PROCEEDINGS

The Court: We're here this morning on a Motion that was filed August 24th by defense counsel, Mr. Supman and Mr. Kistler. Are you ready to proceed?

Mr. Kistler: If your Honor please, we're here again this day on the Motion of the defendant, Buddy Lynn Whittington, a minor 14 years of age, begging the Court at this time that he be released to his parents or placed on bond or sent to the Franklin County Detention Home while this matter is pending. We have several times since this matter was filed prayed the Court and requested the Court for this relief because of the minority of this child that is involved and because of the intolerable situation in which he is from necessity being held. Since August the 11th, this boy, who had just barely reached 14 years of age and who at the time of his apprehension was in the schoolroom and was, when he was not in school, participating in athletics in the

community, in the Pee-Wee Ball and that type of thing, and living at home in a Christian home with his parents, was brought [Tr. 4] down here and placed in solitary confinement. He is—he's here today. He's alive and he's sane, but it's our contention that it is a marvel that after this long that he has maintained his sanity. It is our contention that not any one of the adults in this room would, if they were charged with a crime, be confined such as this youth is being confined; and it's our further contention that it would be questionable if any of the adults in this room after being confined the period of time that this boy has would be sane. If the Court please, a situation developed the day before yesterday. The hearing was to have been the 24th. On the 23rd, the defendant, through his attorneys, was notified late in the day that the matter could not be heard the next day and that it would be heard on the 31st. The prosecutor's secretary called my secretary and told her it would be the 31st, and my secretary stated at the time to Mr. Morehart's secretary that I did have a trial set for the 31st, which had been set for 2 months. We expect the evidence to show that on the same date, Mr. Supman's secretary was called by Mr. Morehart's secretary and told of the vacation of the hearing [Tr. 5] date the next day and that it would be set for the 31st; and we expect the evidence to show that the secretary of Mr. Supman told Mr. Morehart's secretary that he already had matters set at that time. So that, if the Court please, it's now very definite that the matter is going to go over for some period of time and the hearing will not be apparently for some time which greatly aggravates the condition that does not exist. If your Honor please, the way the situation is in that County Jail, any hardened criminal that is brought in would be put out in the larger area downstairs in the company of other men charged with some disorderly conduct or something or another. With a minor, he is put in a cell, such as your Honor is well familiar with and such as your Honor has stated and did state that at the time the matter of a detention home was up for a vote as being, I believe, improper, maybe intolerable. I'm not sure just what all your Honor said about it, but I know that your Honor recognized the situation and did advise the public that a detention home was needed and there was not a proper place for a minor to be held. I'm sure the officers, any of the officers of this

[Tr. 6] Court would say it is not proper to hold a minor there under those circumstances. And I'm not casting any reflection in any way on the Sheriff's Office; they're doing the best they can under the circumstances. But to keep this boy longer confined there the way it is can do nothing but damage him, mentally and physically, the rest of his life. Now, if the Court please, we have a case here of a boy who has never been involved in any trouble, who has a good reputation in the community. He's always been law abiding, was raised in a Christian home, who is charged with a crime and, by the very nature of our law, is clothed with the cloak of innocence. And it's our contention and we maintain here today, there isn't a single solitary soul living or in existence or anywhere who can come into this Conrt and say this boy was connected or had anything to do with this lady's death. Yet, at the same time, he can be held in solitary confinement on a second degree murder charge. At the same time, Sam Sheppard who was convicted, once convicted, of second degree murder, and which judgment has now been set aside and is out on bond, and the paper says today and the paper said last [Tr. 7] night that he and his wife bought a new forty thousand dollar home in Bay Village. Yet, at the same time, this boy, a child, is being confined in solitary confinement. Now, it is our belief, if the Court please, that this is the only occasion when a boy that age has been confined in the County Jail in solitary confinement. And we think that it is intolerable and it shouldn't be allowed to proceed for another moment. If the Court please, Mr. and Mrs. Whittington, we will establish by the evidence, maintain a Christian home. Mr. Whittington is retired and would spend every bit of the time with his son, and, if the Court for some reason didn't want to allow the boy to be with his parents, as I think the Juvenile Act contemplates, we have others in the community who will volunteer to take the boy into their home and supervise him while this matter is pending. We will establish by the evidence that in this county if a dog, a stray dog is picked up, it is put into a shelter home and allowed to be out into an area at the side of the home where it can be in the light and can exercise. We expect the evidence to show that even the most hardened criminals would never be confined as [Tr. 8] this boy has been confined and that none would be. If your Honor please, if during the war any

of us would have been confined as prisoners of war such as this boy is being confined, immediately the United Nations, the Red Cross, and everybody else would have been up in arms and they would have maintained that it is intolerable treatment of prisoners of war, and we just didn't do it. If your Honor please, it's not the prosecutor's fault; it's not Mr. Elwood's fault, it's not the Sheriff's fault or anybody else that there aren't facilities here, a proper Detention Home. And it's not the Court's fault.

The Court: I'm glad you included me in that, too.

Mr. Kistler: But, if your Honor please, we say the boy is being maintained as he is by the Sheriff under orders from this Court so that it is up to you as to what is proper for a child in these circumstances. All of us here, I think all of us, are parents. We all have sons or grandsons, and I'm sure I know what any one of us would say if it were our son or grandson who was being so held. There is no risk here. We will establish, by all the witnesses that are here, [Tr. 9] that if this boy is put in the custody of his parents or any one of these good folks of Baltimore while this is pending that there is no risk. Yet, on the other hand, damage can be done that will affect this boy the rest of his life. I would suspect that at this point, after having been held that long, he might need psychiatric care; but at least if he is released now while this matter is pending, no further damage would be done. If the Court please, it is up to you. It's under your jurisdiction, and we ask you to contemplate what the Juvenile Act means, which we say—which this Court has ruled to be constitutional. If it doesn't, if the Act doesn't mean that it's for—it's supposed to be for the benefit of a juvenile and that everything's done should be done for the benefit of a juvenile while a matter is pending. If the matter goes on to trial and there is a conviction, naturally the defendant would be punished. But while this is pending to have him undergo the solitary confinement and the intolerable conditions, we feel is just not humane and something that your Honor will not permit further to happen.

The Court: May I ask this? You've [Tr. 10] made a comparison between what happens to us as adults in that institution there as against what's happened to this boy. Do you advocate that this boy be placed with these others, confined with these other people in the jail?

Mr. Kistler: If it please the Court,——

The Court: With the other people in the jail so that he will not be alone. I just——

Mr. Supman: No, sir, your Honor. It is realized that under the statutes that the Court could not permit him to mingle with adults.

The Court: I just wondered. Do you have anything to say, Mr. Morehart? You have some evidence, as I understand, that you want to produce.

Mr. Kistler: Judge, we might add, however, that we would much prefer that to him being up there by himself.

The Court: Are you asking the Court to do that?

Mr. Kistler: It says that the boy shall not be in a prison with adults, I know, but we haven't a detention home, and, if he can't be someplace else, why it would be much preferable for him to be with someone instead of being up [Tr. 11] there by himself. At least it might prevent him from becoming insane or something terrible happening.

The Court: I just asked the question because you in your argument made the comparison. I just wanted to know if that was what you were getting at. Do you want to say anything, Mr. Morehart, or should we hear the evidence?

Mr. Morehart: I don't know what kind of evidence there's going to be, Judge. I don't know that.

The Court: Do you want to say anything before this evidence comes in?

Mr. Morehart: Well, I might, Judge. I don't know what evidence will be presented here this morning. I, notice there is only one branch of the Motion here that the defendant be admitted to bond in a reasonable amount as fixed by the Court or the defendant be immediately released to the custody of his parents pending trial, as provided in Revised Code Section 2151.31 or that he be sent to the Franklin County Detention Home while awaiting trial in this cause for the following reasons:

The Court: What page is that?

[Tr. 12] Mr. Morehart: I'm reading from the second paragraph of the first page. I think that is the Motion. Now, the rest of it is presumably in support of that, isn't that—is that correct?

Mr. Supman: Yes sir, basically.

Mr. Morehart: So I don't know what evidence would be presented. The fact that the parents of the child here are

good people, I don't think that that has much to do with the question here involved, your Honor, as to whether he should be released or not. I only say this, and I believe that the evidence will show, that the defendant here is a delinquent child by reason of the fact that he committed the acts which are complained of in the Affidavit. I think on hearing the evidence, it's going to show that, your Honor. I don't care how law abiding the boy has been, if he committed the act with which he is charged here, then I say that it is of such a serious offense and of such a serious nature that he should not be released to these parents or not be released to anyone else while this is pending. Now I realize that the place we have for detention of juveniles is not all that is to be desired, your Honor; no argument about that. But it is the [Tr. 13] only thing that we have, and the boy while he is here, I understand, now has a television set in his room; and I'm not objecting to that, your Honor. His parents are permitted to see him, I think, at all reasonable times; at least I told the Sheriff as far as I was concerned that at any reasonable times, the boy could be visited by his parents. I'm not objecting to that. But we have a crime here, which it is charged this defendant has committed here, that is of a very, very serious nature, your Honor; and I think to avoid any complications of any nature that might arise, I think the boy should be held pending the outcome here. After all that woman, you know, that woman, Mrs. Willard, she's in the cemetery, and that's not a place most of us would want to be here. I might state to the Court here that it is not unusual for juveniles to be held in this place of detention here in our County Jail. The Court frequently has children or juveniles there in this County Jail. I have a figure here, I believe, the records of the Juvenile Court here show that there were 127 boys and girls under eighteen years of age that were being held in this detention here, such as this boy, in 1965. And they [Tr. 14] were held for various periods of time, any place from a few days up to ninety-two days for one individual, your Honor. And no one before has ever said that anyone has ever gone crazy because of this, and I'm sure that they did not have the privilege of visitors that this lad has had since he's been there. Now I regret always anyone having to be held in juvenile detention or jail, either one, Judge;

we don't like that. But it is a situation of their doing, not ours; and I think, due to the seriousness of the offense, your Honor, that the Motion should be denied and the boy detained. And I'm quite ready to hear this and try this at the earliest opportunity. I regret, of course, that a continuance was necessary, I assure the Court. The Court knows it was four o'clock, I expect or maybe a little after, by the time I got hold of the Court on this matter on the 23rd, and, as soon as I did, we immediately called and tried to reach both attorneys, which we were unable to do so we left the message with their secretaries; and, of course, I want to set a date to hear this and determine it at the earliest possible moment, your Honor.

Mr. Kistler: If the Court please, [Tr. 15] Revised Code 2151.31 says that after a child is apprehended that the child can be released to the parents upon the written promise of the parents to produce the child. Then it also provides, 2151.26, that when a child is charged with a felony that after the child is—if there is a hearing and the child is found to be delinquent, the Court can send the child away to be examined and then can fix a bond for an appearance before the Court. Now this is—this is prior to the hearing on the question of delinquency and certainly if the law contemplates the fixing of a bond after a finding of delinquency, there would be no reason in the world not to fix a bond before the hearing. It is true our Motion reads to fix a bond. I didn't go into that in my argument, but our Motion speaks for itself—to fix a bond or to release the child to the custody of his parents. Mr. Morehart says we're here because of their doing and not ours. This boy is here because of nothing that he has done. He is here—he is being brought in against his will; and the continuances, anything that has happened, in this case, is no way at all attributable to this boy. Now, I may have been wrong when I said he was [Tr. 16] confined on the 11th. He may have been confined before that date. I'm not sure what the original date of confinement was; it might have been a week before that. But, whatever the records show the confinement was, I think the first hearing date was to have been the 11th. But whatever it is, he's been down there considerable time. Now we do have witnesses here, your Honor, as to whether or not, their opinions as to whether there would be any

risk in allowing this boy to be with his parents or on bond or with any of the good folks in Baltimore while this is pending.

The Court: All right. Who do you have?

MARGARET MCDANIEL, being first duly sworn, as provided by law, was examined and testified as follows:

Direct examination

By Mr. Supman:

Q. Would you state your name please?
A. Margaret McDaniel.
Q. Mrs. McDaniel, where do you live?
A. 725 Washington Street.
Q. In Baltimore, Ohio?
A. In Baltimore.
[Tr. 17] Q. Are you related to any of the parties here, Mr. and Mrs. Whittington or Buddy?
A. No.
Q. With reference to their home, where do you live?
A. Catty-cornered across. I can see their home from my living room.
Q. Do you neighbor with the Whittingtons?
A. We're not in and out of the house, but——
Q. You have been in their home?
A. But we've always been friends.
Q. I see, and you're acquainted with Buddy then?
A. Yes.
Q. Has Buddy ever been in and out of your home or your yard?
A. No.
Q. Have you had an opportunity, or excuse me. How long have you been a neighbor of theirs?
A. I don't know when they did move there. I've lived there for thirty some years. Ever since—I was there before they were.
Q. And this would be at least five or ten years that they were there?
A. Oh yes.

Q. Have you had an opportunity to observe Buddy in the neighborhood?

[Tr. 18] A. A lot of times.

Q. Have you seen him in play with other youths or other children?

A. A lot of times.

Q. Do you have any opinion as to his reputation as a law abiding citizen or youth in the area?

Mr. Morehart: I object, Your Honor.

The Court: May I ask, Mr. Supman, the purpose of this line of questioning?

Mr. Supman: As to whether she feels—she would feel any particular fear or any apprehension if he was released in the custody of his parents.

The Court: Oh, we're here. They have evidence. Let's hear it. Overruled.

Mr. Supman: Let me rephrase that. Perhaps it might allay his objections, your Honor.

Q. Are you acquainted with his reputation in the community as an individual?

A. Yes.

Q. And you're acquainted with the reputation that he is held by other people?

A. That's right.

Q. What would you say his reputation to be?

A. Very good.

Q. Would that also pertain to his reputation as to [Tr. 19] being a law abiding citizen?

A. Right.

Q. I imagine this matter has been discussed in this particular neighborhood of yours and in the Whittingtons?

A. Yes.

Q. Among the people that you know and associate, that have this reputation of Buddy, do you feel that there would be any objection to his being placed, during the time that this matter is involved in the Courts, if he's placed with his parents?

Mr. Morehart: Object.

The Court: Overruled. I'll hear it.

Mr. Morehart: Your Honor, the question was, "Do you feel that there would be any objection?", that's what you said.

Mr. Supman: No, no, among the people—well——

The Court: Let's hear it. You have a chance on cross examination, Mr. Morehart.

A. I feel that there is no one in the neighborhood who is afraid of Buddy in any way. We have had no reason to be afraid of Buddy. I have two teen-age girls and I asked them last night if they would be afraid, and we have left them at home at night by themselves, and they say absolutely not; and I feel the girls know Buddy better than I do yet.

[Tr. 20] Q. In the, excuse me.

A. And they are not afraid.

Q. Did you say that you have been in the Whittington home?

A. No I haven't.

Q. You never have been?

A. No.

Q. That's all. You may inquire.

Cross-examination.

By Mr. Morehart:

Q. Did you say also that the Whittingtons have been in your home?

A. Not many times, no.

Q. How recently?

A. Well just lately.

Q. Has, to your knowledge, has Buddy Whittington ever been in your home?

A. He's never been in our home.

Q. He's never been in your home, and you've never been in their home?

A. No.

Q. You live quite some little distance away from them, do you not?

A. Well, I can see the house.

Q. But you have to look across what would be the [Tr. 21] school property, would it not, onto another street?

A. Yes.

Q. I mean Fremont Street runs north and south, and your street runs roughly east and west?

A. Right.

Q. I have no further questions.

Redirect examination.

By Mr. Supman:

Q. Did your children associate with Buddy?
A. No, they're older than Buddy is, and they're girls.
Q. But you say you can see their house. About how far would it be with reference, as the crow would fly, a half block, a block, would you have any way of estimating it?
A. I would say maybe you would consider it a half a block, not quite.

Mr. Supman: Thank you very much. You're excused.
The Court: The Court has a question. Have you heard—you spoke about the reputation or that means what is said about this defendant in the community, have you heard that he is charged as he appears to be here? Have you heard that?

A. Yes. The reference that I—the one thing that I particularly mean is pertaining to school. The elementary secretary is my close friend and she says that [Tr. 22] she wished that more of the boys were like Buddy in school.

The Court: Did she say that with reference to having a charge of this kind placed against them?

A. With—in general. His actions in school.

The Court: That's all I wanted. Anything more?
Mr. Supman: No. Thank you.

(Witness excused)

Mary Mauger, being first duly sworn, as provided by law, was examined and testified as follows:

Direct examination.

By Mr. Supman:

Q. Would you state your name please?
A. Mary Mauger.
Q. Where do you live, Mrs. Mauger?
A. 800 Washington Street, Baltimore.

Q. With reference to the Orville Whittington home, where do you live?

A. We live right south of it.

Q. Are you next door neighbors?

A. Yes, only about a fifty foot lot in between.

Q. I see, and how long have you been a neighbor of the Whittingtons, approximately?

A. It will be nine years in October.

[Tr. 23] Q. During that time, did you have occasion to associate with Mr. and Mrs. Whittington and with Buddy?

A. Yes.

Q. Did you associate with other people with whom they associated in the community?

A. Yes.

Q. Have you had occasion to associate in the community within the last three or four weeks since this incident occurred?

A. Yes sir.

Q. Are you acquainted with the reputation in the community of Mr. and Mrs. Whittington and Buddy then in reference to this matter?

A. Yes.

Q. What would you say the reputation which Buddy Whittington has in the community?

A. Excellent.

Q. You're acquainted that he has been charged with an offense, is that right?

A. Yes sir.

Q. Have you had an occasion to be talking with the various neighbors since this has come up?

A. Yes sir.

Q. And he still enjoys a good reputation?

A. That's right.

[Tr. 24] Q. Have you ever visited in the home of the Whittingtons?

A. Yes.

Q. How frequently in the past?

A. Inside the house, not too much. Just chit-chat.

Q. And has Buddy ever been in your home?

A. Occasionally.

Q. Do you have an opinion as to whether the neighbors, including yourself, would feel there would be any risk in-

volved if Buddy is returned to his parents' home during the pendency of this case?

A. I've never talked to any that would be afraid of him, no.

Q. And you yourself would not be?

A. Absolutely not.

Q. Have you ever seen any acts of unlawfulness or any signs of misconduct on behalf or by Buddy?

A. No, never.

Q. Do you have children?

A. Yes sir.

Q. What are the youngest ones?

A. Well, they're married, both of them.

Q. Do you have grandchildren who visit in your home?

A. Yes.

Q. And what would their ages be?

[Tr. 25] A. Three and five.

Q. Would you feel there would be any risk with the grandchildren who would be visiting you if Buddy was next door with his parents?

A. Absolutely none.

Q. Are you acquainted with whether the Whittingtons have a good Christian home?

A. They do have.

Q. Are you acquainted with their church habits, of the Whittingtons or Buddy?

A. Yes.

Q. Do you by any chance attend the same church?

A. No.

Q. Are you acquainted that Buddy does go to church?

A. Oh yes.

Mr. Supman: I see. I think that will be all. Thank you very much.

The Court: Anything, Mr. Morehart?

Cross-examination.

By Mr. Morehart:

Q. Yes. Mrs. Mauger, how long has it been since Buddy Whittington has been in your home?

A. Not lately.

Q. When you say "not lately," what do you mean? You mean a year, two years, three years?

[Tr. 26] A. They frequently used, well not frequently, would use the phone. I'm not sure whether he ever did or not. He would come to the door. He has been to the door, but to come into the home, no.

Q. Mrs. Mauger, if you believed that the charge which has been placed against Buddy Whittington, that of killing Mrs. Willard, whom I assume that you knew, were true, would you say then that his reputation is good?

A. I don't understand.

Q. Well, if you believed or if it was proven to you that the charge against Buddy Whittington was true in that he did kill Mrs. Willard, would you then say that his reputation was good?

Mr. Kistler: Object.

The Court: What's the objection?

Mr. Supman: We're going after reputation, your Honor, and reputation is something that——

The Court: Now Mr. Kistler, he made the objection. What's the basis of your objection?

Mr. Kistler: That's calling for a conclusion. It's calling for an aswer as to something that doesn't exist, hasn't been established. It's conjectural.

Mr. Morehart: This is cross examination, too, and it has to do with reputation; and she's testified as to reputation, not me.

[Tr. 27] The Court: That's right. Overruled.

Mr. Kistler: What the reputation is and what's charged in this Court would be two entirely different things.

The Court: That's overruled. Go ahead. Maybe Mrs. Mauger would like to have that question repeated.

Court Reporter: I'm not sure I can; I can play back the tape.

Mr. Morehart: I can rephrase it. Mrs. Mauger, if you believed or it was shown to your satisfaction that Buddy Whittington had committed the crime with which he is charged, that of killing Mrs. Willard, would you then say that he had a good reputation?

A. His reputation, as far as I am concerned, is good up until now.

Q. But if that was established, then would your opinion be changed as to what his reputation——

Mr. Supman: I object, your Honor.

Mr. Kistler: We object if the Court please.

The Court: Your objection was overruled. She answered it any way.

Mr. Morehart: I have nothing further.

(Witness excused)

RAYMOND EUGENE KERN, being first duly sworn (witness affirmed), as provided by law, was examined and testified as follows:

[Tr. 28] Direct examination.

By Mr. Supman:

Q. Would you state your name please?

A. Raymond Eugene Kern.

Q. Where do you live, Mr. Kern?

A. 814 Washington Street, Baltimore.

Q. What is your business or occupation?

A. I work for Gaffney Motor Freight here in Lancaster.

Q. Are you acquainted with Mr. and Mrs. Whittington and Buddy?

A. Yes sir.

Q. Where do you live in reference to them?

A. I live up the corner and then I turn right. It's two, three doors across the alley. The back of our lot is within a hundred feet or so of their property.

Q. And from your house to their house, as the crow flies, how far would it be?

A. About two hundred feet.

Q. About two hundred feet?

A. Well, from our houses, it's a little farther. It's about five hundred.

Q. How long have you been a neighbor of the Whittingtons?

A. Five or six years.

Q. During that time, have you associated in the [Tr. 29]

neighborhood with people that associate with Buddy and the Whittingtons?

A. Yes sir.

Q. Do you have the means of knowing Buddy's reputation and the Whittingtons reputation in the community?

A. Yes, I do.

Q. What would you say Buddy's reputation is?

A. I've chased a lot of kids away from my home, but he's been in my house many times and I never, and my wife and my teen-age daughter, never saw anything out of the way, and my mother-in-law is the same way. He's been in the house a lot of times, Buddy has. I had to chase kids away, but I never had to worry about Buddy when he was around.

Q. Then would you say you would be acquainted with the reputation other people would have of Buddy?

A. Yes sir.

Q. And what would you say the reputation would be?

A. I've never heard anything against any of them.

Q. You have teen-age daughters?

A. I've got one. She's married now.

Q. I see. Would Buddy still be welcome in your home?

A. Yes sir.

Q. Do you or your family have any feeling of any risk or fear if Buddy would be placed in his parents' home?

A. No sir. My boys asked several times to come in to [Tr. 30] see Buddy, but I didn't know if it would be allowed. He's only fourteen years old.

Q. You have a son who is fourteen?

A. Yes, and I have one thirteen.

Q. And Buddy plays with your boys?

A. Yes sir.

Q. Have you at any time ever seen or heard of any conduct of Buddy that you feel would be improper or unlawful?

A. No sir.

Q. You are acquainted that he's being charged with being a delinquent and having something to do with Mrs. Willard?

A. Yes sir. May I say something?

The Court: Just answer the questions if you will, Mr. Kern.

Q. And if the Court would see fit to place Buddy under a bond or in the custody of his parents during the pendency

of this case, would you have on behalf of your family or your children or yourself or your neighbors have any fear that there would be any risk involved?

A. No sir. There is more fear right now, than what there would be if Buddy were out.

Q. There's more fear in what way?

A. All ways. We're sure Buddy didn't do this. We [Tr. 31] don't know who did it.

Q. In other words, there's feeling in the community that someone else may have done this?

A. Yes.

Q. Do you have an opinion as to whether the Whittingtons have a good Christian home?

A. Yes, I do. We go to church every Sunday morning, and there's very few mornings I've ever seen that they didn't go.

Q. And Buddy too?

A. Yes sir. They always waved when they went by.

Mr. Supman: You may inquire.

Cross-examination.

By Mr. Morehart:

Q. Mr. Kern, would your feelings be different if you were convinced that Buddy Whittington had committed this crime of killing Mrs. Willard?

A. If I was convinced.

Q. Then they would be different, would they not?

A. My opinion would be different if it was proven to me.

Q. I see. What you have said now as you believe him to not to be dangerous is based on the idea, the belief you have that he did not commit this crime, isn't that right?

A. That's right.

[Tr. 32] Mr. Morehart: I have nothing further.

Redirect examination.

By Mr. Supman:

Q. Have you ever visited the jail down there, Mr. Kern?

A. No, I haven't. I was in the front part there once, I think.

Mr. Supman: Thank you. I think that's all.

(Witness excused)

CLYDE T. TOLLIVER, being first duly sworn, as provided by law, was examined and testified as follows:

Direct examination.

By Mr. Supman:

Q. You're Clyde T. Tolliver?
A. That's right.
Q. Where do you live, sir?
A. 209 North Walnut, Baltimore, Ohio.
Q. Mr. Tolliver, do you have any relationship with the Whittingtons?
A. No, I don't. Only just association.
Q. What is your business or occupation?
A. I'm a paper-maker at Gaylord Container, have been there for eleven years.
[Tr. 33] Q. You have children of your own?
A. Four.
Q. You have any Buddy's age or approximately?
A. Jerry, my oldest son, is the same age as Buddy.
Q. Have you associated in the last several years with Buddy Whittington?
A. Yes, on ball teams and my boy runs around with him quite a bit, what I mean, playing ball and stuff like that.
Q. Has he ever been in your home?
A. Many times.
Q. Has your boy ever been in their home?
A. Yes.
Q. Have you ever visited in the Whittington home?
A. Several times, yes.
Q. Do you have a means of being acquainted with the reputation that Buddy Whittington would have in the community?
A. Yes, I would say so.
Q. What would you say his reputation to be?
A. Excellent.
Q. Buddy plays ball, you say?
A. Yes.

Q. What kind of team?

A. He's played on Pony-League Team ever since, oh I would say, he was 8 years old. Now, he started with the Reds [Tr. 34] Ball Team, and I had him for a couple years there on what they call the Reds Little League and he was always a good player. He was always polite, well mannered.

Q. Did you ever see any act, any illegal acts or unlawfulness or delinquency on behalf of Buddy?

A. Never.

Q. Did you ever see an occasion in ball games when feelings may have gotten a little bit high as far as Buddy is concerned?

A. No. On some of the other players, yes. And, some of the spectators, yes; but as far as the boys and their sportsmenship, no; because, the boys, to them it's a ballgame.

Q. I see. You never saw Buddy act up in any way?

A. No, never.

Q. Never saw him lose his temper?

A. No.

Q. Do you have an opinion as to whether the boys or the parents in the neighborhood would feel there was any risk involved if Buddy was returned to his parents during the pendency of this case or put out on bond?

A. No. There is no fear that I would know of. The fact of the matter, quite a few of the boys are pretty bitter about it because he's down there now. They don't seem to think he should be held. They don't think he should [Tr. 35] have been picked up to start with.

Q. Would you have any thought as to whether Buddy could be placed in your home if the Court didn't want to place him with his own parents?

A. Buddy has always been welcome in my home. He's welcome now in my home.

Q. If the Court would see fit for instance perhaps to place Buddy in your home instead of his own parents' home during the pendency, would you consent to that?

A. Yes. I'd consent to it if Mr. Whittington and his wife are willing. I don't go to church as often as I should. I try to bring the children up right. I think he would do better in his own home, but, what I mean, I have no objection to it. The fact of the matter, my wife and I

have talked it over and the boy, the oldest boy, and they said if that was the only way that he could be released, it would be fine with us.

Q. As far as feelings in the community, so far as you know, they don't feel there's any risk if Buddy would be put out on bond or in the custody of his parents?

A. No. There is no risk as far as I'm concerned.

Mr. Supman: Thank you.

Mr. Kistler: Just one moment, sir.

(Mr. Supman and Mr. Kistler confer)

Mr. Supman: Are you acquainted with whether the [Tr. 36] Whittingtons are known to have a good Christian home?

A. Yes, they do have. I think the preacher is, the parson can say more to that than I can, but the boy's attended church, and I never heard a wrong word one way or the other out of any of them.

Mr. Supman: Thank you. That's all.

Cross-examination.

By Mr. Morehart:

Q. You made the statement that your boy thought he should not have been picked up in the first place. Why? Was that because they feel that he is not guilty?

A. That's right.

Q. The statements you have made are also based on your conviction that he's innocent, is that right?

A. Yes.

Mr. Morehart: That's all.

(Witness excused)

Jim Reed, being first duly sworn, as provided by law, was examined and testified as follows:

Direct examination.

By Mr. Supman:

Q. Would you please state your name?

A. Jim Reed.

[Tr. 37] Q. What is your business or occupation?

A. I am a teacher-coach for the Liberty Union School.

Q. Where do you live at the present time?

A. I live at 441 East Market Street in Baltimore.

Q. With reference to the home of Mr. and Mrs. Orville Whittington, where do you live?

A. I live approximately in the east end of town, and their's is more or less in the middle. It's about, I would say, a mile from their home.

Q. How long have you been a teacher up there?

A. This will be my second year. I've taught one full year.

Q. And what do you teach?

A. I teach Junior High Social Studies, and I coach in free varsity sports.

Q. During the teaching and your coaching, have you had Buddy under you?

A. Yes sir, I have.

Q. And what can you tell us about Buddy's conduct and reputation?

A. I would say among his classmates, first of all, that he has a very good reputation. I think his fellow students have always looked up to Buddy as a leader. He's a quiet type, but I think all the students in the class [Tr. 38] with him respected Buddy. He was classified in 8B, 2 Section. They would classify them into Sections. Now I'm not exactly sure how these were classified but supposedly Buddy is in a group of youngsters who may have difficulty learning, which is not always true because I find there are some students in these sections who do as good a work as sections of supposedly brighter students. This doesn't always hold true. Buddy was a hard worker in class. I taught him history, I tried to teach him history, and I felt that I got through to Buddy. He was a good history student. He had a sense of history, I believe. He got C's and D's, but he had to work for them. He was an honest student. There was never any doubt if a day should come when I thought he was not doing the job he should have, I would ask him if he had read the assignment, and if he had not he would tell me so. There was no hee-hawing around. He would say, "No, Mr. Reed, I did not read it." As far as athletics are concerned, he was a manager for me of the Freshman

Basketball Team. The general consensus of the coaching staff, the high school coaching staff and the junior high coaching staff, is Buddy was the best manager that has come out of the school in many a year. Luckily, I asked Buddy in class one day if he would be interested, and he told me that he would have to talk with his mother and father first to see what they might say. [Tr. 39] He came back with their approval, told me that he would be there every night; which is a requisite of a manager. He must be there. He must be responsible, and these were met completely by him. Only one time, he missed a practice session. He told me the night before that his mother desired him to go to a church meeting, I believe it was. Buddy asked me if this would be okay, and, as he had always been there and had carried out every duty that was assigned him, I told him this would be okay. And this was the only time that he had ever missed. A good example of his acceptance of responsibility——

Mr. Morehart: I'm going to object to any further—this wandering here. He can say what he thinks but——

The Court: Well, Mr. Morehart, I don't know how long this will continue, but I think we'll let him proceed.

A. Just an example by what I mean by his accepting responsibility. He would—. On Tuesday evenings, we went to a different school to practice basketball. He would get out a few minutes early, have everything ready to go for me when I was out of school, if I had a class and couldn't get out quite as early as he did. This was carried on every week as a normal procedure by Buddy.

Mr. Supman: Are you acquainted with the reputation which Mr. and Mrs. Whittington may have in the community?

A. I do not know Mr. and Mrs. Whittington too well. [Tr. 40] I've never heard anything against them.

Q. All right. Would you say then you would be acquainted with the reputation which Buddy would have among the other students?

A. Oh yes.

Q. What would you say about that?

A. I would say it was very good.

Q. Did you ever see anything out of the way as far as Buddy's activities were concerned, anything improper?

A. No sir.

Q. Do you feel there would be any risk if Buddy were placed with his parents or some other suitable home up there during the pendency of this action?

A. No sir.

Q. You are acquainted with the nature of the charge which has been placed against Buddy?

A. Yes.

Q. You have children of your own?

A. I have one, sir.

Q. What age?

A. I have a youngster who is five years old.

Q. Do you feel that Buddy would create any kind of risk around your child?

A. No, certainly not. As a matter of fact, Buddy has played with my young boy during the basketball sessions. [Tr. 41] Q. Even though this charge has been placed against him, if the Court would see fit to place him on any kind of probation, not probation but a bond or with the custody of his parents, you feel again there would be no risk and you would have no objection to him playing with your child?

A. No sir.

Mr. Supman: You may inquire.

Cross-examination.

By Mr. Morehart:

Q. If you believed that the charge which has been placed against Buddy Whittington is true, would you then change your opinion as to the risk involved?

A. I'm sorry, sir. Would you repeat that?

Q. If you believed that the charge against Buddy Whittington, that has been placed against him, were true, would you then have a different opinion as to the risk involved of him being released?

A. If I believed the charge were true?

Mr. Morehart: Yes.

A. I might have.

Q. So, what you're saying is based upon your opinion that the charge is not true?

A. I believe the charge is not true.

Mr. Morehart: That's all. Thank you very much.

(Witness excused)

[Tr. 42] Mae Trimmer, being first duly sworn, as provided by law, was examined and testified as follows:

Direct examination.

By Mr. Supman:

Q. Would you state your name?

A. Mae Trimmer.

Q. Where do you live?

A. Blacklick Road, most northern road in Fairfield County.

Q. You are a housewife?

A. That's one of my positions.

Q. What is Mr. Trimmer's name?

A. Virgil.

Q. I see. Are you acquainted with Mr. and Mrs. Whittington?

A. I surely am.

Q. And with Buddy?

A. Yes.

Q. Are you any relation to these people?

A. No.

Q. How do you happen to be acquainted with the Whittingtons?

A. I had Buddy when he was in the third grade, and I was in their home when he was just a little toddler.

[Tr. 43] Q. Are you a teacher?

A. Yes.

Q. In which school do you teach?

A. I'm just a substitute now, but I taught for twelve years.

Q. I see. How many different years have you taught Buddy in school?

A. I only had him when he was in the third grade.

Q. Have you been able to keep up your acquaintance with Buddy and the Whittingtons in recent years?

A. Yes.

Q. Have you ever visited in their home?

A. Yes.

Q. Have they visited in your home?

A. Yes.

Q. Including Buddy?

A. Yes.

Q. Do you have a means of knowing then the reputation which Mr. and Mrs. Whittington have in the community?

A. They have a wonderful reputation.

Q. Do you know if it is a good Christian home?

A. Yes, it is.

Q. How about Buddy's reputation?

A. It is excellent.

Q. Has Buddy ever been in your home by himself or [Tr. 44] just with the parents?

A. Just with the parents.

Q. You live out a ways, is that right?

A. Yes, about seven miles, I guess it is.

Q. Do you know if among the people you associate with that are acquainted with the reputation of Buddy, whether, as to whether it is felt there would be any risk involved if Buddy were placed with his parents or on bond during the pendency of this case?

A. I haven't heard of anybody that would be afraid to have him out.

Q. And you personally would feel no risk?

A. No.

Q. He would still be welcome to visit in your home?

A. He certainly would.

Q. I see. Is there anything else you can tell us about this reputation and as to being a law-abiding citizen?

A. Two or three years ago, when we went to Stoutsville together, attending camp meeting, we had some boys who just tried their best to see how much patience Buddy had. They really teased him terribly, and I felt he had a right to tear into them, almost. But he just took it like a gentleman. I've seen him teased terribly. He never showed any signs of temper or fighting back.

Q. What kind of camp is this you referred to?

[Tr. 45] A. It is church camp.

Q. I see. Did you teach Sunday School?

A. I teach Sunday School, but I've never had Buddy in a Sunday School Class.

Q. Do you know him as a regular attender at Sunday School and church?

A. Oh yes, sure. We miss him so much these last few weeks.

Q. Is there a Youth Fellowship or some kind of youth group?

A. Yes.

Q. Are you around the church Sunday evenings when that is in attendance?

A. Yes.

Q. Are you acquainted as to whether Buddy is a regular attender there?

A. Buddy attends regularly.

Mr. Supman: You may inquire, sir.

Cross-examination.

By Mr. Morehart:

Q. Mrs. Trimmer, you are aware, of course, of the charge here against Buddy Whittington, that is of killing Mrs. Willard?

(Witness nods head yes)

The Court: Is your answer "yes"?

[Tr. 46] A. Yes.

Mr. Morehart: Would your opinion be different if you believed that to be true?

A. I don't believe it to be true, no.

Q. I say if you would believe it to be true, would your opinion be different as to your safety then?

A. No.

Q. It wouldn't be any different?

A. No.

Q. Even if you believed it to be true?

A. I don't—no. I don't believe it to be true.

Q. And nothing can convince you that it is true, is that right?

A. He only.
Q. He only?
A. He only. If he would confess.
Q. And if he did that, would that make a difference to you, as to your belief then in his reputation, Mrs. Trimmer?
A. I don't think so.
Q. You don't think it would even at that, even if it was proven to your satisfaction that he had killed Mrs. Willard, it would not make a difference to you as to his reputation?
A. No. I would say no.

[Tr. 47] Mr. Morehart: All right. Thank you very much.

(Witness excused)

(Ten Minute Recess)

HAROLD SAGER, being first duly sworn, as provided by law, was examined and testified as follows:

Direct examination.

By Mr. Supman:

Q. Would you state your name please?
A. Harold Sager.
Q. Where do you live?
A. 224 North Street, Baltimore, Ohio.
Q. What is your business or occupation?
A. Production Manager at Altens Foundry and Machine Works, Lancaster.
Q. How long have you been living in Baltimore?
A. All my life, 42 years.
Q. Do you live in proximity to the Whittington home? How far do you live from them?
A. They're in the center of town, and I'm in the northeast corner, probably three-quarters of a mile.
Q. Are you acquainted with the Whittingtons and Buddy?
A. Yes.

[Tr. 48] Q. In what particular manner are you best acquainted with them?

A. Through the church. We're all members of the same church.

Q. Which church is that?

A. New Zion E. U. B., which is a country church?

Q. I see, and what is your capacity with the church?

A. I'm Sunday School Superintendent.

Q. How long have you been in the teaching capacity in the church?

A. I've been Superintendent for twelve years.

Q. How many members in your congregation?

A. About a hundred twenty-five.

Q. Have you had occasion to teach Buddy?

A. Once or twice. Not as a regular teacher. When I filled in as an assistant when the teacher wasn't there. I filled in a few times.

Q. Are you acquainted with the attendance of Buddy in your Sunday School?

A. Yes.

Q. You're acquainted with—in the neighborhood or in the area with people who are acquainted with Mr. and Mrs. Whittington?

A. Yes.

Q. You have the means of knowing the reputation among [Tr. 49] those people of Mr. and Mrs. Whittington?

A. I believe so.

Q. And what would you say it to be?

A. I would say it is very good, especially from neighbors. I've heard the statement that you couldn't ask for any better neighbors.

Q. And are they considered to have a good Christian home?

A. Yes sir.

Q. What can you tell us about the reputation that Buddy has in the community or in the church?

A. In both cases, I would say it would be the same. He has reputation without question as far as honesty or anything like this is concerned. Especially in the church, I would say it is very good. Almost every Sunday night in the year, I pick him up and take him to Sunday night service and Youth Fellowship. My wife and I are Youth Directors, and we have first-hand contact with him. We've also

had contact with him at Stoutsville Camp Meeting when we've been chaperones there.

Q. As Youth Advisors, you have occasion to be sitting around in conference with the people who are attending the Youth Fellowship?

A. Yes.

Q. How large is your Youth Fellowship there?

[Tr. 50] A. At the present time, we have about twenty-three members.

Q. And is there a discussion back and forth, pro and con, different subjects?

A. Yes, every Sunday night.

Q. Are you acquainted with whether Buddy regularly attends Sunday School?

A. Yes, he does.

Q. How about church? Is he old enough to normally——

A. Sunday School and Sunday morning worship, and then Youth Fellowship at seven o'clock, and worship service in the evening beyond that. Normally, and I believe now and then, well normally, he's in church for three services a week, two on Sunday morning and one on Sunday —well two on Sunday night actually. Actually, there are four services.

Q. The extent of his regularity would be what?

A. Ninety-five per cent of the time. I think we were looking back the other day. The first six months of this year, I think, he missed Youth Fellowship one night.

Q. Have you at any time ever seen any misconduct on behalf of Buddy?

A. Absolutely not.

Q. Have you ever heard of him conducting himself improperly?

A. No sir.

[Tr. 51] Q. Do you feel that there would be any risk involved in the church or in the community if Buddy were placed by the Court during the pendency of this case in the home of his parents or some other neighbor?

A. I don't know what it would be. I can't think of any risk there would be.

Q. You have children of your own?

A. I have two. I have one just a year older than Buddy.

Q. Do they associate together?

A. Sure.

Q. Has Buddy ever visited in your home?

A. He hasn't visited to stay overnight, but our home is always open to the Youth Fellowship members when we have fifteen or twenty, or sometimes twenty-five; and he's been there numerous times.

Q. Has he ever conducted himself in an improper manner?

A. No.

Q. Have your children ever visited in Buddy's home?

A. They've been in it a few times, but not what you would really call visiting, I guess.

Q. Do you feel that Buddy would create any risk in the neighborhood or in the community if he were placed by this Court with his parents?

[Tr. 52] A. No. He doesn't have any temper. I've never seen him mad in my life.

Mr. Supman: That's all. You may inquire.

Cross-examination.

By Mr. Morehart:

Q. Mr. Sager, you are aware of the charge against Buddy Whittington here, that he killed Mrs. Willard? You're aware of that, I assume?

A. I'm aware of the charge of second degree murder. That's what I've heard anyhow.

Q. If you were convinced that the charge against Buddy were true, then would you say then that there would not be any risk involved in letting him loose?

A. I'm not convinced that the charge is true.

Q. But assume that you were convinced, would you then say that there would be no risk?

A. I don't know how I can answer a question like that when I don't feel that way. I feel that he's not guilty, and I feel there is no risk.

Q. Your basis then for your feelings—. At the present time, you are convinced in your own mind that he's not guilty and that is the basis for your reason of your saying that there would be no risk, is that right? Is that true?

A. Yes, and even if it should be possible you could prove him guilty, I'd still say there's no risk.

[Tr. 53] Q. You'd still say there's no risk?

A. That's right.

Mr. Morehart: That's all.

(Witness excused)

Rev. C. S. Poling, being first duly sworn, as provided by law, was examined and testified as follows:

Direct examination.

By Mr. Supman:

Q. Would you state your name please, sir?
A. Rev. C. S. Poling.
Q. Where do you live, sir?
A. Route 2, Baltimore.
Q. Are you affiliated with a church at this time, Rev. Poling?
A. I am, yes.
Q. Which is that church?
A. New Zion Evangelical United Brethren.
Q. Are you acquainted with Mr. and Mrs. Orville Whittington?
A. I am.
Q. And Buddy who is sitting here?
A. I am.
Q. How long have you known these people?
[Tr. 54] A. Seven years approximately.
Q. Have you been associated with this church approximately that long?
A. I was pastor four years and in the interim that I was not pastor and in all the rest of the years; I was pastor there five years; but I've been associated with them between times.
Q. During that time have you—you did have an opportunity to associate then with people with whom Buddy and the Whittingtons associated?
A. I did.
Q. Would you have a means of knowing their reputations in that area and community?
A. I do.
Q. What would you say the reputation of Buddy Whittington is?
A. Excellent.

Q. And Mr. and Mrs. Whittington?
A. Very good.
Q. Have you visited in their home?
A. I have.
Q. Would you be able to describe this as a good Christian home?
A. It is.
Q. What about Buddy's attendance at church affairs, [Tr. 55] Sunday School or church?
A. Very regular. Regular.
Q. Is this over a period of several years that you've been involved with the church?
A. It has been.
Q. And Mr. and Mrs. Whittington are—they are the same?
A. They are the same.
Q. Have you at anytime ever seen any misconduct or heard of any on behalf of Buddy Whittington?
A. I have not.
Q. You are acquainted that there's been a serious charge placed against Buddy at this point?
A. I am.
Q. Would you have an opinion as to whether there would be any risk involved if the Court should release Buddy into bond or into the custody of his parents during the pendency or the hearing of this case?
A. I personally think there is no risk.
Q. Have you had occasion perhaps to be discussing this with other members of your church or the Youth Fellowship?
A. Not with the Fellowship. I discussed it with two or three other members.
Q. And do they feel the same as you?
[Tr. 56] A. They feel the same. In fact, I discussed it with a dozen or more. There is that feeling in the church and in the community.
Q. That there is no risk?
A. There is no risk.
Q. Have you ever counseled with this boy?
A. I have. Not—Yes, I have recently.
Q. And prior to this incident?
A. Yes, he was in my class in catechism for a number of months. I was very personally connected with him.

Q. Would there be anything in that counseling that would indicate any type of risk factor for this Court to consider?

A. Nothing at all.

Mr. Supman: You may inquire, sir.

Cross-examination.

By Mr. Morehart:

Q. Rev. Poling, you said that you have talked to a number of the people in the community relative to the risk of his being released, is that correct?

Mr. Supman: Excuse me. I didn't hear the question.

Rev. Poling: Is that the way he stated the question?

Mr. Supman: What was that question, I'm sorry?

Mr. Morehart: My question was that I asked him if he had said on direct examination that he had talked to a [Tr. 57] number of people in the community relative to the risk involved in his being released. I thought that was what you had testified to on direct examination.

Mr. Supman: Something to that effect.

Rev. Poling: That wasn't the direct question though.

The Court: Ask the questions please and let counsel have his witness answer the questions without interruption please.

Mr. Morehart: I understood you to say, Rev. Poling, that you had talked to a number of people in the community relative to whether or not there would be any risk involved in Buddy Whittington being released. Is that—Did you make that statement?

A. That's correct.

Q. That you had talked to a number of them?

A. Yes. At least one-half dozen, let's put it that way.

Q. I see, and now can you tell me, Rev. Poling, whether their idea of whether or not there was any risk involved was based on their opinion as to his innocence?

A. State it again please.

Q. Was their opinion that there would be no risk involved based upon the fact that they thought that he was innocent. Is that correct?

A. That's correct.

[Tr. 58] Q. Do you think their opinion would be different if they thought he was guilty?

A. Am I here to pass judgment or as a character witness?

The Court: You're here expressing an opinion, Reverend, and this is a proper question.

Rev. Poling: Well then, state it again please.

Mr. Morehart: Do you think that their opinion as to whether or not there would be any risk involved would be different if they thought he was guilty?

A. That's possible, yes. If they thought he was guilty.

Mr. Morehart: I see. Thank you. That's all.

Redirect examination.

By Mr. Supman:

Q. One other question. Have you visited Buddy in the jail?

A. I did.

Q. How many times have you been there?

A. Once.

Q. Where was he in the jail when you were there?

A. He was standing in the, he was standing in the toilet when I was talking to him. Is that right?

Buddy Whittington: The toilet and everything else.

Rev. Poling: Whatever you would call that place. I [Tr. 59] talked to him through the bars there.

Mr. Supman: Were you able to see the size of this cell?

A. Yes, pretty definitely.

Q. Would you have an opinion as to whether you feel this is a proper place for a young boy Buddy's age to be for a period of time?

A. I certainly do not. This county has needed a jail for thirty years, a different set-up than we have now. I've been in this county for a number of years. In fact, I was born here.

Q. You feel that as far as the adequacy of these facilities, they would not be so?

A. Right.

Q. Do you feel that there would be some harm that would come upon Buddy or any juvenile his age to be there for any length of time?

A. I certainly do.

Mr. Supman: That's all sir.

The Court: I'd like to ask—Rev. Poling, is it?

A. It is.

The Court: Do you remember a few years ago receiving a communication from me asking your assistance and your church's assistance to obtain a detention home?

A. I do, but I wasn't pastor then. I had retired. [Tr. 60] I'm just serving now temporarily.

The Court: But you did get such an appeal from me?

A. I got such an appeal, yes.

The Court: I don't know whether you heard any talks that I made; you may have heard of some talks that I made.

A. Yes, I never heard the talks, no.

The Court: That was the only question I had to ask. Maybe I shouldn't put my two cents in on that, but I——

Mr. Supman: I assume from what you have said that you would hardly endorse any talks that the Judge may have made calling attention to the complete inadequacy of these facilities. Is that right, sir?

Rev. Poling: How was that stated?

Mr. Supman: Would you agree that the facilities would be very inadequate and that they would need something done?

A. I do agree to that, yes.

Mr. Supman: That's all. Thank you.

(Witness excused)

OLLIE MAE WHITTINGTON, being first duly sworn, as provided by law, was examined and testified as follows:

[Tr. 61] Direct examination.

My Mr. Supman:

Q. What is your first name, Mrs. Whittington?
A. Ollie Mae Whittington.
Q. And you're the mother of Buddy?
A. That's right.
Q. Mrs. Whittington, up until this incident occurred some place around the 3rd or 4th of August, who was living in your home?
A. Buddy and my husband and myself.
Q. How many rooms are in your house?
A. We have six rooms and bath.
Q. How many bedrooms?
A. Three bedrooms.
Q. Was there a separate bedroom for Buddy?
A. Yes sir.
Q. Are you employed?
A. No sir.
Q. Is Mr. Whittington employed?
A. No sir, not now. He's retired.
Q. Are you able to devote full time to the supervision of Buddy if the Judge should feel that this would be more appropriate than being in the jail, or any appropriate place?
A. Yes sir. I have been all his life. I've been [Tr. 62] home. I've never been gone from him. I've taken care of him full time, and I can now, and I'm willing.
Q. If the Judge would place Buddy on bond or in your custody, would you be able to exercise twenty-four a day supervision of Buddy?
A. I surely would.
Q. And is Mr. Whittington available to do so, also?
A. Yes sir.
Q. And he's not employed?
A. No sir.
Q. Mr. Whittington is retired, is that right?
A. Yes sir.
Q. Has Buddy at any time ever been violent or committed any illegal act to your knowledge?
A. Buddy's been everything we ever wanted in a son.

He's never at any time—. He's good around the house, and he never gets mad about anything. He's been a good boy.

Q. Has he always been obedient?

A. He surely has been. Sometimes, if he'd get unruly, you could sit down and talk to Buddy and maybe he'd have a little different opinion of something that we had, but we could always reason with him.

Q. You have visited Buddy in the jail?

A. Yes sir.

Q. Do you have an opinion as to what continued and [Tr. 63] enforced incarceration in that cell, as to whether it would affect Buddy's mental well being?

Mr. Morehart: I object to this, your Honor. I don't think the witness is competent to testify to that.

The Court: I think she can answer. This is the boy's mother.

Mr. Supman: Do you have an opinion?

A. Yes sir. I think anybody being penned up like that by themself for as long as he's been, or for as long as he might have to be, I think even myself, or even an adult, it would work on your mind. It couldn't help but do that, just penned up there all day long.

Q. You feel that if this continues that it would be injurious to your son's health?

A. I think it would be.

Q. Would you be willing to personally be responsible for Buddy's appearance at any and all hearings or proceedings that may be called by this Court?

A. Yes sir.

Q. Would you be prepared to sign a bond, including your home and so forth, as security for this?

A. Yes sir.

Q. And you would be physically able and willing to not have Buddy out of your sight?

A. Yes sir.

[Tr. 64] Q. Or any other reasonable conditions or any other conditions that the Court may impose?

A. Yes sir.

Q. And you're asking the Court then for him to be placed in your custody and care during the pendency of these proceedings?

A. That's been my prayer.

Q. Do you—Anything else you have to say in this regard?

A. No. We'll take Buddy to church and do the best by him we can. If he's in our care, we'll do just like we always have. We always went to church and attended things in the community, and we'll do the best we can do by him.

Mr. Supman: You may inquire.

Cross-examination.

By Mr. Morehart:

Q. Mrs. Whittington, do you go to see Buddy?

A. Yes sir.

Q. How frequently do you go?

A. Every day.

Q. Every day. Have you ever been denied the right to see him?

A. No sir.

Q. Does Buddy have a television set there?

[Tr. 65] A. Yes sir.

Q. Does he have anything to read?

A. Well, he could have if he wanted something to read.

Q. If he wants to read, he could read, I mean; it's available?

A. Well not there, but we could take it if he wanted it.

Q. And nobody would object to that?

A. I don't think so. I never asked, but I don't think so.

Q. But you think he doesn't want anything to read, is that right? At least, he never asked for anything?

A. Well, he reads some. He has some magazines there that he reads.

Q. He does have some magazines that he reads, and he has the television set?

A. Yes.

Q. Have you noticed any change in Buddy since he's been there? Does he appear to be healthy?

A. Well, when he sits there all day long, sometimes he doesn't say much when we go in. I think his mind might be dulled by being there. There's nothing for him to do, just sit there. It would affect your mind, too, or anybody's.

[Tr. 66] Q. You think it's affected his mind so far, Mrs. Whittington?

A. I don't think it's done it any good. I don't think—

He's quiet. I don't know whether it has or not. I don't think it's done him a bit of good being there.

Q. Has it affected his health physically, do you know, Mrs. Whittington?

A. I haven't had him to a doctor or anything. I can't tell that sir.

Q. Has there been any complaint from him about his health?

A. One night when we were down there, he said he wasn't feeling too well, or he hadn't been the night before.

Q. That might even happen if he were home with you, might it not?

A. It could.

Q. Has there been any necessity to consult a doctor or to have a doctor see him because of his physical health?

A. Not yet.

Mr. Morehart: I don't think I have anything further.

Redirect examination.

By Mr. Supman:

Q. Is there an electric light in his cell?

A. No sir.

Q. Is there any place to put a light in so that he [Tr. 67] could read, to your knowledge?

A. I don't believe there is, not to my knowledge. I haven't been inside, but I don't know that there would be, no sir.

Mr. Supman: Thank you. That's all.

(Witness excused)

Orville A. Whittington, being first duly sworn, as provided by law, was examined and testified as follows:

Direct examination.

By Mr. Supman:

Q. You're Orville A. Whittington, sir?

A. Yes.

Q. And you're the father of Buddy Whittington?

A. Yes sir.

The Court: Would you please, Mr. Whittington, talk a little bit louder because I don't hear you.

Mr. Supman: You've heard the questions that were put to your wife?

A. Yes.

Q. And you are retired, sir?

A. Yes sir.

Q. If the Judge would see fit to place Buddy either on bond or in your home pending the outcome of this case, [Tr. 68] would you be able to devote twenty-four hours a day time and attention and supervision of Buddy?

A. Yes sir.

Q. Is that your wish?

A. Yes sir.

Q. Do you have any opinion as to whether the continued incarceration of Buddy in a cell, such as he's been in, would have any effect on his health or well being?

A. I think it would anybody to stay in there very long.

Q. In your particular son's case?

A. Yes sir.

Q. Are you willing then to do anything that the Court would so instruct if he would let Buddy out on bond or on any conditions?

A. Yes sir.

Q. Would there be any hesitations at all in Buddy being out, as far as you're concerned?

A. No sir.

Q. Do you feel there would be any risk to yourselves or anybody else in the community?

A. No, I don't.

Q. To your knowledge, has Buddy ever been violent or committed any offenses against persons or property in an illegal manner?

[Tr. 69] A. Not that I ever knew of.

Mr. Supman: You may inquire, sir.

Cross-examination.

By Mr. Morehart:

Q. No questions.

(Witness excused)

Mr. Supman: We rest, your Honor.

The Court: Outside of your opening statement, do you have any statements you want to make or arguments about this matter or not?

Mr. Supman: Does Mr. Morehart have any witnesses?

Mr. Morehart: No, I'm not going to call any witnesses.

Mr. Kistler: Yes, if your Honor please, we would like to make a closing statement. Now I think that there has been eliminated any question in any of our minds as to whether or not there could be any risk in Buddy being released on bond or into the custody of his children—or into the custody of his parents. I don't believe in any case, there's been a more respectable group of witnesses offered than what there has been here today. There has been offered residents [Tr. 70] of Baltimore who know more about this and are in a better position than anyone else to feel the feeling of the community and to know the feeling of the community. Not, of course, as to his innocence, but as to whether or not there is any risk in this boy being released. You've heard some of the finest people in Baltimore testify about how he's attended church, how he participates in athletics, a well-behaved kid. The neighbors who know him best would have him in their homes at any time, around their teen-age children, around everyone involved. I think now the Court can feel perfectly clear in regard to this matter that there is no risk involved and that what is contemplated by the Act that the minor be left with his parents pending a hearing, that there is now no reason at all not to grant the prayer and the request of the defendant.

The Court: Mr. Morehart?

Mr. Morehart: Your Honor, we've heard a number of witnesses here that's true, and everyone of them on cross examination admitted that they were convinced of his innocence. Naturally, if they're convinced of the innocence of of the defendant, naturally they would feel there [Tr. 71] would be no risk in having him released. Several did say they might feel differently if they were convinced of his guilt, you see, which makes an awful lot of difference certainly. If I was convinced of his innocence, or anybody else, I would say there couldn't be any harm in having him released, your Honor. I'm not saying anything about these people that were called here, and they have a right to their opinion, your Honor, no question about that. But I'm sure

that we could probably bring a number of people in here, too, who would say that it would be very detrimental and that they would not want him released at the present time. So your Honor, I still say, in view of the gravity of the crime with which the defendant is charged here, that the defendant should be held pending the hearing.

Mr. Kistler: If the Court please, what counsel say in this matter; of course, Mr. Supman and I are both firmly convinced and always have been that there is no risk in any way involved and what the prosecutor thinks or what I think isn't important. It's a question of what the evidence is that's been offered. This matter was set for hearing, and there's been no evidence, [Tr. 72] offered whatsoever, to show or to establish or to discredit the testimony offered by the defendant that there is no risk. The record is quite clear that there is no risk and it is the best thing for the boy to be released, and that the feeling in Baltimore is that he should be released.

The Court: Well, the Court has this to say. This isn't a case of what public opinion, popularity poll, might be about this thing. This Court has a responsibility to this community. This Court has a responsibility to this young man. Motion denied.

The Court: Now gentlemen, I'd like counsel to sit down here and let us fix as early a time as we can for this hearing.

(Hearing on Motion concluded)

[Tr. 73-74] IN THE JUVENILE COURT OF FAIRFIELD COUNTY, OHIO

No. 6183-J

In the Matter of

BUDDY LYNN WHITTINGTON, AN ALLEGED DELINQUENT CHILD

HEARING

Date: September 2, 1966.

Before: Hon. ROBERT U. HASTINGS, Judge.

APPEARANCES:

For the State of Ohio: E. Raymond Morehart, Prosecuting Attorney, Fairfield County, Ohio.

For the Defendant: Judson C. Kistler, Attorney at Law, 124½ W. Main Street, Lancaster, Ohio; and Jack Supman, Attorney at Law, 124½ W. Main Street, Lancaster, Ohio.

[Tr. 75] PROCEEDINGS

The Court: There were some Motions filed a little bit ago in this case, Mr. Prosecuting Attorney.

Mr. Morehart: I believe so, your Honor.

The Court: Do you have them there?

Mr. Morehart: I have copies of them.

Mr. Supman: The originals—the one secretary brought them in.

The Court: "Motion. Now comes the Defendant, Buddy Lynn Whittington, a minor 14 years of age, and again moves the Court that an official court reporter be employed to take the testimony in any further hearings in this said cause, and suggests that Alvin A. Omsberg, the official court reporter of the Common Pleas Court, or a reporter from the firm of Armstrong and Oakey or some other firm of accredited reporters be employed to take the testimony and the proceedings so that during the course of any further proceedings if a question is asked to be read back that the same can be done and also so that the testimony can be typed

and transcribed after the same is taken." Do you have anything to say about that, Mr. Kistler?

[Tr. 76] Mr. Kistler: Yes sir, we have, your Honor. But we have another Motion to make, your Honor, before we argue that matter, an oral Motion for a dismissal of these proceedings.

The Court: Now that—we're talking about this motion right now.

Mr. Kistler: But even before we argue that one, your Honor, we would like to make the Motion to dismiss the proceedings for something that occurred within the last fifteen minutes. If your Honor please, in the last few minutes, before this matter proceeded for hearing at nine, in the witness room were certain witnesses for the prosecution, Mr. Willard, Mr. Jack Willard, a sister of the decedent and a pathologist, and these witnesses were located in the witness room which is next to the clerk's office of the Juvenile Court. In the Clerk's Office were located Mr. Rutherford, Mr. Elwood Phillips, Dr. Kersell, Mr. Ned Webb, and the Court was in there just a few moments ago along with the prosecutor in the presence of all these men. It is our contention that we cannot have a fair trial and protect the rights of this defendant by proceeding with this hearing when all these witnesses were [Tr. 77] gathered together in the presence of the Court in a room in which there is an opening between the witness room and the clerk's room where anything, any statements that were made could be heard by all the witnesses in either room. And in view of that, we feel that this proceeding can only be dismissed and this defendant released immediately.

The Court: Motion overruled. Now we come to this Motion, which I just read to you. Do you have anything to say to this Motion?

Mr. Kistler: Yes, your Honor, we certainly have with the Court's permission. We requested an official Court Reporter to take this testimony in these proceedings at the time this proceeding started.

The Court: When? I don't find that in the file.

Mr. Kistler: Well, we didn't file that of record, but we asked that——

The Court: Oh, you just thought that?

Mr. Kistler: No sir. We asked to have the record taken.

The Court: Will you tell me now—. Will you tell me

now, Mr. Kistler, what is your authority to have a record taken of testimony in [Tr. 78] a Juvenile Court proceeding for a juvenile?

Mr. Kistler: Well, I would say the authority would be a case decided recently by the Court of Appeals in the Pickaway County area in which a record was taken which could not be properly transcribed. The matter, I believe, went to the Court of Appeals and, I believe, a new trial was ordered because a record, a proper record, could not be made.

The Court: What is that case?

Mr. Kistler: I can't tell you the case.

The Court: Oh, you don't have the citation?

Mr. Kistler: I do not have the citation, but it was called to my attention and I would say——

The Court: Where did you get that, from some official court reporter of some kind?

Mr. Kistler: Yes sir. I did get it from an official court reporter.

The Court: Well, let's have it. I'm here to hear your citation of law.

Mr. Kistler: Mr. Omsberg related to us that he had heard that that did occur.

The Court: He had heard. Did he give [Tr. 79] you the citation?

Mr. Kistler: No sir, he did not.

The Court: And you cannot give it to me?

Mr. Kistler: I cannot give you that citation, but I can say this, your Honor, that in this case we have a serious matter pending against the defendant. We feel that since this defendant is subjected to the laws of the state of the land that he'd have the same right as any other defendant in any proceeding to have a record taken.

The Court: And the basis for the record, is what? What is the basis for your record?

Mr. Kistler: For the defendant to properly prepare himself. Now in this case for instance, a good example of it, we had testimony taken last Thursday. We requested in writing, which is filed, the typing of that evidence to be used in this proceeding. We requested it, I think shortly after, either Monday or Tuesday. Now, if the Court please, we were told the day before yesterday that the record coudn't be typed, that the record wasn't typed because the

reporter hadn't received an order from you to do so. Today, we were told that we couldn't have that record, due to the press of business, for at [Tr. 80] least thirty days.

The Court: Now, as a matter of fact, you were told, my information is you were told, by the Court Reporter that she couldn't get at it. Is that right?

Mr. Supman: That's right.

The Court: All right, that's right. So let's don't misstate to me what the Court ordered or didn't order. You know the Court here has an official Court Reporter. This Court does.

Mr. Kistler: That I can't say, Judge, but I can say this——

The Court: Well, the Court's telling you that we have an official court reporter and not only an official court reporter but an official assistant court reporter. It's a matter of record and so this motion is overruled.

Mr. Kistler: May we say this——

The Court: Yes.

Mr. Kistler: We asked to have some questions read back at the last hearing and they could not be read back. So we feel that we cannot proceed with the present reporting system.

The Court: I see. All right. Now the next Motion is, "Now comes the defendant, Buddy [Tr. 81] Lynn Whittington, a minor 14 years of age, and moves the Court that this said Complaint and this entire proceeding filed against him in this said cause be dismissed for the following reasons: The defendant has been confined for a period of twenty-seven days, to wit since August 5th, 1966, in solitary confinement in an iron cell and cage, all as forbidden by the Constitution of the United States, the Constitution of the State of Ohio, the Federal decisions, and the Revised Code of the State of Ohio, and the Civil Rights Act, all of which forbid cruel and inhumane punishment being inflicted upon any individual, and especially where a minor who has only reached the age of fourteen on July 23rd, 1966, so that the rights of this minor as guaranteed by everything that we stand for and the legal system of jurisprudence of the United States and The State of Ohio, have been taken from this minor defendant. The defendant, Second, the defendant has been refused bond even after various Motions and requests have been made by the defendant for the fixing of

the same and even after a hearing was had in this Court in which a large number of witnesses testified, including a minister, a schoolteacher, [Tr. 82] a Sunday School Superintendent, neighbors of the defendant and others, all of whom established that there was absolutely no reason for the holding of this boy in solitary confinement in the iron cage that he is now being held in and in which hearing no evidence was offered whatsoever to give any indication that the boy should be so held or that theere was any risk in any way in releasing the boy to bond or to his parents, and it was established that the parents were fine Christian folks who would spend every moment of their time with the boy if he was released and in which hearing it was indicated by everyone, including the Prosecutor, that the parents of the minor defendant were fine Christian people, as is the defendant, who has never been in any kind of trouble whatsoever. Three, the defendant has been deprived of his constitutional rights in that at the beginning of the hearing he requested a court reporter to take all the testimony, meaning a reporter who could read back the questions and then type up the record and such was not granted to him. Four, the defendant in this case was deprived of rights in that he was examined by an official of this Court and by other law enforcement officers and [Tr. 83] subjected to gruelling interrogation for a period of several hours without first being advised of his rights which are: One, he must be informed in clear and unequivocal terms that he has the right to remain silent. Two, the warning of the right to remain silent must be accompanied by an explanation that anything he says can and will be used against him in Court. Three, he must be warned not only that he has the right to counsel but also that if he is indigent a lawyer will be appointed to represent him. Four, if he indicates in any manner at any time prior to or during questioning that he wishes to remain silent, the interrogation must cease. Five. At a hearing in this court on the 24th day of August, 1966, testimony was given and then the defendant requested, by a written request, that the testimony and the record of the proceedings be typed up so that the same would be available for him at a hearing on Friday, September 2nd, 1966. On Wednesday, August 31st, 1966, in the late afternoon, the defendant's attorney called the official Court Reporter as to when the

testimony and proceedings and the record would be ready and was informed that she had not proceeded to type the [Tr. 84] same because she had not been instructed to do so by the Court." Which the other counsel denies and says differently. "Six, That this cause be dismissed for the reason that the defendant has not been granted a speedy trial as contemplated by the Revised Code of the State of Ohio, the Constitution of the United States and the State of Ohio and the decisions of the Federal Court. The defendant was arrested and confined on Friday, August 5th, 1966, the arraignment was set for two o'clock p.m. at the same time a request was made for a continuance until Monday or Tuesday, August 8th or 9th since the Courthouse was closed on Saturday, August 6th, 1966. The Prosecutor was unable to be present at any hearing until August 11, 1966 at nine o'clock a.m. On August 11th, 1966, the defendant and his counsel appeared and were ready for the hearing and the Prosecutor stated to the Court that he was not ready to proceed with the hearing and evidence and again asked for a continuance at which time the defendant objected to the continuance unless the defendant would be released on bond or in the custody of his parents. The Prosecutor then notified the Court that the matter could not be [Tr. 85] held until August 18th, 1966, at which time the defense counsel would be out of town and had so notified the Court in writing over two months prior." May I ask if the counsel who says he does that, was he an attorney for the defendant two months prior?

Mr. Supman: Mr. Whittington was not a defendant two months ago.

The Court: Did you represent Mr. Whittington two months ago?

Mr. Supman: Mr. and Mrs. Whittington, the parents, but not the boy.

The Court: Well you're citing that your letter——

Mr. Supman: Excuse me, your Honor. We may have been in error in the explanation. There was a letter written by me to this Court over two months ago that I would be out of town this period of time.

The Court: Let me ask you. Is it the habit of Courts to keep a running file wherein notice is given by attorneys as to when they are going to be out of town?

Mr. Supman: It has been recommended to me by, maybe not by this Court, your Honor, but [Tr. 86] I know some of the other Courts, they need to know; as a matter of fact, there has been a request that has come down to the attorneys from the Common Pleas Court that they want to know when the attorneys are going to be out of town as far in advance as possible so no cases would be set during that period of time, and also, I feel, that it is courtesy.

The Court: Continuing, "The matter was then set for August 24th, 1966 at nine o'clock a.m. The defendant again renewed his Motion to be released on bond or to be sent to some suitable place other than the solitary cell in which he was being incarcerated and which Motion was again denied. It was then approximately nine days from August 11th, 1966, before the Prosecutor filed a precipe for a necessary witness, a doctor who was the pathologist in this case in an adjoining county, after which the precipe was then sent by certified mail. That the said doctor had still not been notified on August 22nd, 1966, that he was to be in Court on August 24th, 1966, and this was the reason given by the Prosecutor why the hearing could not be then held on August 24th, 1966. In fact, it was between 4:30 and 4:45 on [Tr. 87] August 23rd, 1966, that the defendant or his counsel was notified that the hearing would not be held on August 24th, 1966. The defendant again renewed his Motion and presented testimony by a large number of witnesses without contradiction that the defendant should be put out on bond or in the custody of his parents. Listening to all this evidence, the Court without any evidence being offered to oppose the Motion whatsoever, denied the Motion. Seven, That the Cruel and inhumane solitary confinement in an iron cage that this defendant has been subjected to, has already done him irreparable harm and to continue to keep him so cruelly and inhumanely confined can only lead to insanity or some other grievous result from which this fourteen year old boy will never recover." Let me ask, counsel who filed this Motion, isn't this Motion a repetition of what others you have had?

Mr. Kistler: If the Court please, we do not believe so. Since the last hearing, these other things have occurred in regard to a request for the testimony.

The Court: Now that request of the testimony, was that made to the Court?

[Tr. 88] Mr. Kistler: It was made to the official Court Reporter.

The Court: Now so you knew that there was an official Court Reporter. Now let me ask you something else. Is it—do you find that it is the practice of Courts that just the moment you ask an official Court Reporter to type out a record that it's done immediately upon your request?

Mr. Kistler: Yes sir. During the course of a trial, that has been our experience.

The Court: Regardless of what else that Court Reporter may have to do?

Mr. Kistler: No matter how busy the Court Reporter is, during the course of a trial, they have always typed it.

The Court: Now this was not during the course of a trial when you asked this, is that right?

Mr. Kistler: This was during the intermission between hearings. We requested that——

The Court: Oh, I see. What else is there that is new and not repetitious about this Motion?

Mr. Kistler: If the Court please, so [Tr. 89] many more days have elapsed since the time of the last hearing on this boy's confinement. This boy—It is our opinion, if the Court please, that never in the history of the Juvenile Courts has a minor been so confined as this boy has been confined, when he's presumed innocent, when he maintains his innocence, and subjected to what he has been subjected to. If your Honor please, this last week's confinement may mean the difference between his life, between his sanity and his insanity, and, if the Court please, his position is much more strong now than what it was at the time the last Motion was made.

The Court: Let me ask you this. You've made similar kind of statements at the time you presented your evidence of character witnesses, and my recollection is, you told the Court you were going to have a physician from Columbus to testify to those things, am I right?

Mr. Kistler: We had stated your Honor before, that we would like to have our physician down to testify.

The Court: And you told me you were going to have him.

Mr. Kistler: We intended to have him.

[Tr. 90] The Court: And when the hearing was had, he didn't appear.

Mr. Kistler: We weren't able to have him. It was a question of financial reasons that we couldn't have him at that point. There was also—We just weren't able to make the arrangements to have him here that morning.

The Court: Well, let me ask you this, Mr. Kistler, this particular Motion asks to have the Complaint dismissed. Isn't the charge that was filed alleging this boy to be a delinquent, it still was set for today for hearing of the facts, am I right?

Mr. Kistler: That's true, if your Honor please, but——

The Court: All right. Now let me ask you this. Because all these things which you allege here, you think that dismisses a charge of delinquency without a trial?

Mr. Kistler: Yes, if your Honor please, we think so. We think this boy now, in serving almost thirty days in solitary confinement, has paid when he is just being charged more dearly than he would be and could be if he were found guilty after hearing in this Court. He wouldn't [Tr. 91] be subjected to this type of thing after he was found guilty.

The Court: Well, Mr. Kistler, I think we concluded at the time you brought this question of place of detention up, wasn't it brought out, and everybody recognized the fact, that the place of detention is the only place that the Court has to detain anyone, wasn't it?

Mr. Kistler: What? The what your Honor?

The Court: That the only place the Court had to detain anyone was where he is detained?

Mr. Kistler: No sir. It was brought out and the evidence established that he could be released to the custody of his parents.

The Court: I mean detained.

Mr. Kistler: Or to bond or to, we suggested, the Columbus Detention Home, and your Honor said you wouldn't call the Franklin County to ask if he——.

The Court: May I ask what the authority is for this Court to detain anyone in the Franklin County Detention Home?

Mr. Kistler: The authority is your [Tr. 92] Honor that in some previous case some two years ago that you called and requested the Court to——

The Court: And I couldn't get it.

Mr. Kistler: That is right. Two years ago.

The Court: Two years ago?

Mr. Kistler: Something like that, you stated. I don't recall.

The Court: That still doesn't say that I have the authority to put anyone in that institution, does it?

Mr. Kistler: No, your Honor, but it is our contention that the Juvenile Code is so drawn as to clothe your Honor with power to do what is best for a boy, and certainly, as your Honor has said time and time again, that is not a proper place for a child.

The Court: But didn't it come out in the hearing that that was the only place that I had available for detention?

Mr. Kistler: I don't believe there's any evidence offered to that effect.

The Court: Well, I thought the discussion here recognized that fact. As a matter of fact, one of your own witnesses was interrogated [Tr. 93] about—maybe he was requested to support this thing. Mr. Prosecuting Attorney, you want to say anything about this?

Mr. Morehart: Your Honor, just this. That if you assumed that all this was true, that was said here, it would be no basis for dismissal of the Complaint, your Honor.

The Court: That's the Court's feelings, and most of the things that are talked about in this Motion have been before the Court before; and we're here this morning for a trial of the facts. That Motion is dismissed.

The Court: Here's another Motion. "Now comes the defendant herein through his counsel and renews the Motion to dismiss the proceedings against him by reason of the fact of the unconstitutionality of the Juvenile Code provisions." Now I take it the rest of this verbiage in this Motion is argument. Am I right about that, Mr. Kistler?

Mr. Supman: Well, yes sir, but——

The Court: Or should I read all this argument? "The Juvenile Statutes as presently constituted deprive this defendant of his constitutional rights to a fair and impartial trial. [Tr. 94] That the manner in which the statutes——"

Mr. Morehart: Your Honor, may I interrupt for just a second?

The Court: Yes sir.

Mr. Morehart: The Court has already ruled that the

Juvenile Code Act is not unconstitutional, and this is certainly a repetition of that Motion.

The Court: I'm looking forward to whether maybe they add some other thing.

Mr. Morehart: I see.

The Court: There is so much to this Motion, and I asked counsel if the rest of it was argumentative, and I got no answer.

Mr. Supman: If you would like an answer, your Honor, we feel that there are specific examples which we would like to bring to the Court's attention why we feel that they are.

The Court: But weren't—wasn't that argument presented at the time we heard the Motion on the constitutionality?

Mr. Supman: Some of these in here, your Honor, were not gone into. At the previous hearing, my recollection is that we felt that the Act was unconstitutional because it did deprive [Tr. 95] him of certain rights, but there are some additional items below that were not covered previously.

The Court: Would you like to point them out to the Court for the purpose of saving time? We're here for a trial, and am I to understand that these—all these Motions filed this morning are delaying tactics?

Mr. Supman: No sir. No sir. We would like to have a ruling on them today, and ask the case to be dismissed. Or, if overruled, we are ready to proceed. We are ready to proceed, your Honor.

The Court: I am a little bit impressed with the volume of these things. I'll read it. I'll finish reading it. I'll go over it again. "The Juvenile Statutes as presently constituted deprive this defendant of his constitutional rights to a fair and impartial trial. That the manner in which the statutes are presently constituted and out of necessity have to be administered by this Court, the Court's self appointed investigating officer was called by the Court to investigate this minor defendant for an offense which may or may not have been committed by this [Tr. 96] defendant, which this defendant does deny, but which subsequently did result in a charge. That the statutes as constituted require the investigating officer to submit facts to the Judge of this Court as a basis and grounds for issuing a warrant and a complaint for an arrest of the same defendant who will be tried by the Judge."

Mr. Supman: Same Judge.

The Court: "Thusly and in consequence thereto, these statutes do not in any manner permit any Court who has heard facts to be the basis of an arrest, to be able to render a fair and impartial decision. In fact, such as in this case, the officer of the Court not only made the investigation but failed to acquaint the defendant with his constitutional rights, that he was entitled to an attorney, to remain quiet and that any statements he made would or could be used against him. That now when this very same question will be presented to the same Court on a Motion to suppress the evidence and there will be testimony by the same investigating officer who under the statute must be appointed by the hearing Judge, as to the merits of this Motion. That the same investigating officer who will testify has [Tr. 97] been permitted to remain in Court to hear all of the Motions and testimony which Court is under the complete control and supervision of a Judge as provided by the statutes, whereas, actually the Judge does have control and did exercise control of his Court and excluded others but did allow the investigating officer to remain in the Court Room when he will be called later as a prosecuting witness. That under the circumstances as recited and as provided by the Statutes, a Judge under these Statutes is placed in this compromising position. That this Court has now to pursue under the Statutes in this case to hear this cause after having previously heard the claims of the prosecution and his own investigating officer. It is submitted that in a serious felony charge which according to the Statutes would authorize the Judge to find this boy a delinquent and possibly bind him over to the Grand Jury with the resulting publicity that he has already been found guilty of committing the offense with the resulting notoriety so as to deprive him of a fair and impartial trial according to the standards as layed down by the Federal Court in the recent Sheppard case. Wherefore, it is again submitted [Tr. 98] that the Statutes which put the defendant and any Court in this situation in light of the Supreme Court and other Court rulings out of necessity has to be declared unconstitutional as an abridgment of the rights of this defendant to a fair, speedy and impartial trial." Now, I'd like to hear what you have to say then about this matter.

Mr. Supman: Your Honor, we feel that the statutes of Ohio which permit the things to occur as set forth in this Motion are unconstitutional.

The Court: Have you any evidence to support these allegations in here as facts?

Mr. Supman: We submit—Well now, if the Court would, for instance—Yes sir, I feel that most of these facts would be within the preview and within the knowledge of the Court. For instance, that Mr. Bill Rutherford, who is the Investigating Officer and who is in the hearing at this time and has been, is appointed by the Court. It is our understanding——

The Court: That's right.

Mr. Supman: All right. And that Mr. Rutherford is an officer of this Court and as such he reports to your Honor. [Tr. 99] The Court: Now, the fact that I want to know and the allegation that you made is that he did report to this Court facts. Have you anything to support that allegation?

Mr. Supman: There was a Complaint which was submitted to your Honor, facts on which he based his warrant and a complaint against this defendant.

The Court: In other words, a Complaint was filed?

Mr. Supman: Yes sir.

The Court: Which I think is a fact. I think the Complaint is in the file.

Mr. Supman: Yes sir, and I think Mr. Rutherford signed that Complaint.

Mr. Morehart: Oh no. Oh no.

Mr. Supman: Mr. Phillips, I believe, may have signed this Complaint.

The Court: You made the statement that Mr. Rutherford filed a Complaint, is that true or not?

Mr. Supman: According to the records, Mr. Phillips signed it, but we submit the investigation was prepared to a great extent by Mr. Rutherford who was an officer of this Court.

[Tr. 100] The Court: All right. Call Mr. Rutherford in here. We'll swear him and we'll find out if that's true or not.

WILLIAM RUTHERFORD, being first duly sworn, as provided by law, was examined and testified as follows:

The Court: Here is the person you are alleging who did these things and you ask him.

Mr. Morehart: Your Honor, may I ask what affect—what does this have to do with the constitutionaltiy of the statutes of Ohio? The Motion is that the statutes are unconstitutional.

The Court: But in the context of all this argument down here, they've raised the question that the Court had knowledge of all this investigation and is now apparently prejudiced. I suppose that is what they're leading to.

Mr. Morehart: But that is immaterial as to the constitutionality of the statutes, your Honor.

The Court; But they're contending that the system, is that right?

Mr. Supman: Yes sir, the statutes or system.

[Tr. 101] The Court: Now, we're concerned here, Mr. Morehart, about the fact that they allege is true—the facts on which they base this.

Mr. Morehart: But your Honor, that has nothing to do with the constitutionality of the statutes.

The Court: Let them then inquire as to the support of their allegation of facts here. Remember this is recited here in a Motion so that it would be made a record, and I would like to hear what they have to say about these—. It is said Mr, Rutherford filed a Complaint, and then it is argued he didn't. Now let's hear it.

Mr: Kistler: If the Court please, is your Honor, calling this witness?

The Court: No. I just suggest that we have him available for your examination. I wanted to know what your—the facts were upon which you based all this allegation.

WILLIAM RUTHERFORD.

Direct examination.

By Mr. Kistler:

Q. All right sir. Will you state your name please?
A. William Rutherford.

Q. Mr. Rutherford, what is your official position in [Tr. 102] the Juvenile Court of Fairfield County, Ohio?

A. I am the probation officer in the Juvenile Court.

Q. And by whom are you appointed?

A. By Judge Hastings, Juvenile Judge.

Q. The Judge of the Juvenile Court of Fairfield County, Ohio. And were you so employed on the second day of August, 1966?

A. I was.

Q. On the 2nd day of August, 1966, did the death of a Mrs. Willard in Baltimore, Ohio, occur?

A. Not that I know of.

Q. Tell the Court whether you know if a Mrs. Willard died around the first of August, 1966.

A. Are you saying on the first of August?

Q. The first week of August?

A. No. I don't think—I think Mrs. Willard was deceased before the 1st day of August.

Q. Mr. Rutherford, I'll ask you if, to your knowledge, a Mrs. Gladys Willard did die on the 29th day of July, 1966?

A. Yes sir. I'm sure she did.

Q. And when you said before you didn't know it was because——

A. It was because it wasn't the 1st week in August.

Q. I see. Now how did you become acquainted with the fact that Mrs. Willard lost her life on or about July [Tr. 103] 29th, 1966?

A. Shortly after ten o'clock p.m. on that date, I received a call from the Fairfield County Sheriff's Office by a Deputy Jerry Hampson asking me to proceed to Baltimore, Ohio, at the request of the Prosecuting Attorney.

The Court: Let me interpose here. I—That is not pertinent to the facts that you allege in this Motion.

Mr. Kistler: Well, we'll get to that, if your Honor——

The Court: Well, let's get to that right now. The allegation in the Motion is that the statutes require the Investigating Officer to submit facts to the Judge of this Court as the basis and grounds for issuing a warrant and a Complaint for the arrest of the same, who would be tried by the same Judge. Now, let's get to the point whether or not he did submit facts to the Judge in order to have a warrant issued and a Complaint made. That's the thing I'm interested in knowing right now.

Mr. Kistler: Mr. Rutherford, after you made the investigation as Investigating Officer of this Court, did you advise the Juvenile Judge anything at all in regard to your investigation?

[Tr. 104] A. Yes sir, I did.

Q. And did you submit to the Judge and advise the Judge of facts which would authorize the issuing of a warrant?

A. No sir, I did not. The Judge was not consulted as to whether a warrant should be issued or charges should be brought. Mr. Morehart, the Prosecuting Attorney, is my legal advisor, and I conferred with him and Mr. Phillips in Mr. Morehart's office, and a decision was made then.

Q. Before the affidavit was filed and before the warrant was issued by this Court, did you advise the Court of your findings?

A. I advised the Court as to the situation that had happened, as to the evidence and what had happened. I didn't at that time have a lot of evidence, and the evidence was not confined to the Judge, no sir.

Q. Did you advise the Court of your findings as a result of your investigation?

A. I advised him I had been called there and that I was there and the type of situation that arose.

Q. So that you did advise him as to whom was being accused and——

A. No one was being accused.

The Court: Wait a minute. You're getting far afield. The point is, Mr. Rutherford, is this a Journal [Tr. 105] Entry that was signed by me authorizing the issuance of a warrant?

A. Yes sir, it is.

The Court: Now that was signed by me and presented to me for signature, when?

A. It's filed on August 5th.

The Court: Was that pursuant to any of your information or was it pursuant to something else?

A. This was pursuant to a Complaint that was filed by Elwood Phillips in this Court.

The Court: Is this that Complaint?

A. Yes sir, it is.

The Court: Is that what you presented to me for the basis of my ordering a warrant?

A. That's right.

Mr. Kistler: Your Honor, may I ask another question?
The Court: Go ahead.

Mr. Kistler: Mr. Rutherford, isn't it true that one Complaint was filed and then just immediately before the defendant was brought in for hearing that you filed—you served to Mr. Supman and I as attorneys for the defendant a second Complaint?

A. I served you a second Complaint and a second warrant.

Q. Why was the second Complaint filed?

[Tr. 106] A. Because the wording on the first Complaint was not complete.

Q. Now then Mr. Rutherford, before any Complaint was filed in this Court, did you not advise the Court of your investigation and your findings and what you found the evidence to be and your conclusion in regard to the matter?

A. No sir, I did not. I informed the Court of the investigation, the kind of investigation, who was involved, but as to the evidence, I did not.

Q. Did you make as a result of your findings accusations against the defendant before this Affidavit was filed by Mr. Phillips?

A. I said to Mr. Morehart I felt that the defendant participated in this action, yes sir. It was all part of my investigation for him, and along—in conjunction with Mr. Phillips, the reason that the Complaint was filed.

Q. Is it your statement that never at any time did you say to the Court your opinion from your findings as Investigating Officer of this Court into a matter of alleged delinquency?

Mr. Morehart: I object.
The Court: Object to that until a time is stated.
Mr. Kistler: Prior to the time of filing of the affidavit by Mr. Phillips.
Mr. Morehart: I object too, your Honor. That's [Tr. 107] already been answered. He's already answered that question.
The Court: Objection sustained because the question has been answered. Is that all about the allegations you made in your Motion?
Mr. Kistler: One other thing, if we may. Mr. Ruther-

ford, did you state to the Court prior to the time of the filing of the Affidavit or at any time close, very close thereto, that it was your opinion that the defendant should not be released under bond?

Mr. Morehart: I'm objecting.

The Court: Objection sustained. That question has been answered as to the facts in this matter.

Mr. Kistler: Mr. Rutherford, by virtue of your employment as an Investigating Officer, when you do investigate an alleged delinquency, especially in a matter as serious as the charge in this case, do you not have the duty of reporting to the Juvenile Judge your findings as a result of the investigation you make?

Mr. Morehart: I object.

The Court: What's the basis for a question like that.

Mr. Kistler: To show exactly what we're contending in the Motion if the Court please.

The Court: You brought out the facts as to whether he did consult with me or not about the facts prior to the [Tr. 108] issuance of a Complaint and that was denied. Now what's the purpose of this question? Whether it's his duty or not. The fact has been established that he didn't.

Mr. Kistler: It goes to the question of constitutionality, if the Court please. Here is a man, who by virtue of his employment, we think——

The Court: Before you ask that question, I'd like to know from you your authority in this Act, where this Act directs that it's his duty to investigate complaints prior to the filing of the warrant.

Mr. Kistler: I'll have to ask him that question then, if the Court please.

The Court: Well he—. You've got the statute. Is there anything in this statute that requires him to make investigations for police duty prior to——

Mr. Kistler: I think that's the duty——

The Court: Have you seen it in the Act? Have you looked at the Act to find that direction of the Act?

Mr. Kistler: I can't say that I can do that, but I can say it is our opinion that the Juvenile Officer appointed by the Juvenile Court is to investigate delinquency, alleged delinquency.

Mr. Morehart: Your Honor, whether it is in the Act or isn't in the Act doesn't make any difference, and it is an improper question to ask this defendant, or this witness.

[Tr. 109] It's not up to him to say what is in the Act and what isn't.

The Court: Mr. Morehart, if they're claiming the Act is wrong, I want to know from them the Act that says that, and they just give me their opinion. You don't know whether it's in the Act, such a direction, or not, do you?

Mr. Kistler: No sir. But we know he did investigate.

The Court: Objection overruled, or sustained on that question. Anything further as to the support of these allegations here that the Court was, had knowledge of all this prior to even the making of a Complaint? That's what you allege in here, isn't it?

Mr. Kistler: By virtue of the requirements of his office.

The Court: Of which you cannot cite, is that right?

Mr. Kistler: If your Honor please, he did investigate on this case, and he does in all others. I know we wouldn't, Fairfield County wouldn't, be paying him to make these investigations——

The Court: You cannot show me where the Act requires that he do that, and, therefore, your premise here is incorrect. This Motion is overruled.

The Court: Now we have another Motion that was filed. "Now comes the defendant, a minor 14 years of age, by his counsel and moves the Court to suppress any evidence of statements purportedly [Tr. 110] made by the defendant for the reason that the defendant only became 14 years of age on the 23rd day of July, 1966, and that he was not represented by counsel when interrogated by law enforcement officers and representatives, his rights were not explained to him, and he was not old enough to be able to appreciate and understand the interrogation and the accusations being made against him, so that defendant respectfully requests the Court to suppress any such evidence in any proceedings before this said Court." Now gentlemen, this is your Motion that we'll hear right now.

Mr. Kistler: If the Court please, the law definitely, or the cases definitely, provide that before a minor is interrogated in any manner that he must be informed first in clear and unequivocal terms that he has the right to remain silent. Two, the warning of the right to remain silent must be accompanied by an explanation that anything he says can and will be used against him in Court. Three, he must be warned not only that he has a right to counsel but also

that if he is indigent a lawyer will be appointed to represent him. Four, if he indicates in any manner prior to or during questioning that he wishes to remain [Tr. 111] silent, the interrogation must cease. Now it is our contention that this boy is entitled to——.

The Court: Do you have some authority for that?

Mr. Kistler: Yes, that's from Miranda vs. Arizona, vs. New York; Westover vs. United States; California vs. Stewart, and it is the exact quotation by the Chief Justice of the United States. If the Court please, we believe it is our duty to bring to the Court's attention at the earliest possible time before a hearing that the Motion to Suppress will be made at any time if any evidence is offered purporting to be statements of this defendant, and we are bringing the matter to the Court's attention at this time because we will make that objection on the basis of these Federal cases at any time such information is offered.

The Court: You have something to say, Mr. Morehart?

Mr. Morehart: Yes, your Honor. I am familiar with the Miranda case. It is a very recent case out of the Supreme Court here. I think it does not warrant the interpretation which counsel for the defendant are putting upon it [Tr. 112] though. That has to deal with a person in custody and that is what the cases there arose from, a person's confession taken while in custody of the police or other investigating officers. I submit, also, your Honor, that there may very well be statements of the defendant which will be related to this Court here, and I submit also that at no time that any statements were made was the defendant accused of having committed this crime, and also any statements that were made or any questions that were asked were made in the presence of the defendant's parents, both of them. And I also submit, your Honor, which the evidence will probably bring out that the defendant was warned even though I do not feel under those circumstances it was necessary—the defendant was warned anything he might say would be used against him and he need not make any statements and he was entitled to counsel, and any conversation that went on, went on with his parents there, and the officers in this case—I may say this. That no investigating officer has talked, to my knowledge, to this defendant since the night this crime was committed, your Honor, and as far

as questioning for several hours that is absolutely [Tr. 113] and utterly ridiculous. It is not true.

The Court: In other words, the prohibition against questioning witnesses and having their statements repeated is after they have been made—taken into custody and arrested.

Mr. Morehart: After they have been arrested, after they are in custody, that is what this case holds, the Miranda Case, your Honor. And I think there isn't any question —I think the case has gone way too far as it is, and I don't think certainly that it should be extended.

The Court: It isn't the purpose of this Court to overrule—. You have something to say?

Mr. Kistler: Yes, if the Court please. In this particular case, it is our contention that the boy was accused that night and that he was not told of his rights prior to the time of the accusations being made. That he was in a sense in custody at the time this gruelling took place over a period of several hours up until approximately two o'clock in the morning, and it is our contention that the Federal Courts, the United States Supreme Court, has definitely ruled on this matter and that these rights of a minor must be protected and if there are any statements offered at any [Tr. 114] time in this matter, we will object to them being admitted.

The Court: This Court is here to protect the rights of this young man. The Court has carefully gone over the Miranda Case, and the Court finds that the Miranda Case does not prohibit the investigation by a police officer or other officers but it does prohibit the gruelling of people after they have been taken into custody as you said. And the Court had that case marked in here by a paper and that paper has disappeared, the case having been laying around on this desk here, and I don't find my mark. But it's the Court's interpretation that that will be decided—each matter will be decided on the facts when the case comes up. Motion overruled.

The Court: Now we've progressed an hour and twenty minutes on these Motions, and I think before we go ahead with the testimony, it's near a recess.

(Ten Minute Recess).

(All Counsel Waived Opening Statements).

Mr. Kistler: If your Honor please, before proceeding with the evidence, we would like [Tr. 115] to move for a separation of witnesses.

The Court: Let me ask you this. I don't know whether Mr. Rutherford is going to be a witness in this case or not.

Mr. Morehart: He's subpoened as a witness.

The Court: He is, and you would like to have him separated even though he acts as a bailiff here?

Mr. Supman: Yes sir.

The Court: You would.

Mr. Morehart: Your Honor, I have no objection. If you want the Deputy Sheriff here to act as Bailiff, I have no objection.

The Court: Can you act as Bailiff? Are you a witness?

Mr. Morehart: I have not subpoened him.

The Court: And he won't be a witness?

Mr. Morehart: He probably wouldn't be in this Court, I don't think. I don't expect to use him in this hearing.

The Court: I'll grant the separation of witnesses, but we ought to have a Court Bailiff. Maybe Mrs. Fricker can act as Court Bailiff. She's [Tr. 116] not going to be a witness, is she?

Mr. Morehart: No. If you want to have Mrs. Fricker, that's quite all right. I have no objection.

Ned K. Webb, being first duly sworn, as provided by law, was examined and testified as follows:

Direct examination.

By Mr. Morehart:

Q. Will you state your name please?

A. Ned K. Webb.

Q. Where do you live, sir?

A. 1261 East Fair Avenue, Lancaster, Ohio.

Q. What is your occupation or employment?

A. I am employed at the Lancaster Eagle Gazette Newspaper as a photographer and lab technician.

Q. Mr. Webb, did you have occasion on or about July 29th of this year, to be called by the Sheriff's Office of this County to take certain photographs?

A. I did sir.

Q. Where did you go?

A. 215 Fremont Street, Baltimore, Ohio.

Q. What time of the day or night was it approximately?

A. Approximately 25 minutes till 9 p.m. on that date.

Q. Is that when you were called or when you arrived [Tr. 117] there?

A. When I arrived there.

Q. When you arrived there, what did you observe when you arrived there?

A. There was a lot of people standing around on the outside. Officer Phillips from the Baltimore Police Department told me he had a body inside the house, took me in, and showed me the area. We backed off there a little bit waiting for the coroner to show up.

The Court: Did I get it, "you backed off"?

A. We backed out of the room.

The Court: I see.

Q. Now did the coroner arrive?

A. Yes sir, approximately five or ten minutes later after I arrived at the scene.

Q. Were you asked to take any pictures of this body?

A. Yes sir.

Q. Did you take some pictures?

A. I did sir.

Mr. Morehart: Will you mark these for identification please?

(Photographs are marked).

Q. Mr. Webb, I'll hand you what have been marked for purposes of identification, State's Exhibits 1, 2, 3, and 4, ask you to look at them, and see if you can identify them [Tr. 118] please. I think they're in order.

A. Yes sir.

Q. What are they?

A. They're pictures of a bedroom at said residence at 215 Fremont Street in Baltimore, Ohio. Also pictures of a body and also picture of the outer frame of the bed where the mattress and springs and bed clothing have been removed.

Q. Mr. Webb, State's Exhibit No. 4, was that—when did you take that? Was that taken before any of the bedding and so forth had been removed?

A. Yes sir.

Q. That's a picture of the room?

A. The room was very small, so I took the picture as far as I could take it. But this shows the general shape the bed was in when I arrived.

Q. In order to get the pictures which are marked State's Exhibits 2, 3, and 4, what was done?

A. The bedspread, sheets, and blankets were removed. Also the springs and the mattress were lifted off, and the outer frame of the bed was left intact.

Q. Are those pictures—do they clearly represent just exactly what you saw when the top of the bed was removed?

A. Yes sir.

[Tr. 119] Q. To your knowledge, had the body been moved prior to the time you took these pictures?

A. No sir.

Q. Do these pictures, in each of them, clearly represent the articles which they represent as you saw them at that time?

A. Yes sir.

Q. Did you develop these pictures yourself?

A. I did sir.

Q. You took them and developed them?

A. Yes sir and printed them.

Q. Do you, sir, know the person, the name of the person whose body is shown in State's Exhibit 1, 2 and 3?

A. Personally?

Q. Yes sir.

A. No. I didn't know her personally.

Q. You did not know her personally?

A. No sir.

Q. There are some, two men whose pictures appear in this State's Exhibit 4. Do you know who they are, sir?

A. On the left facing the picture is Chief of Police Elwood Phillips of the Baltimore Police Department, and on the right is Dr. L. L. Kersell, County Coroner of Fairfield County.

Mr. Morehart: All right. You may cross-examine.

[Tr. 120] Cross-examination.

By Mr. Kistler:

Q. Mr. Webb, who was present when you came to the residence which is indicated in these pictures to take the

pictures that you have taken, which are marked for identification, State's Exhibits 1, 2, 3 and 4?

A. Who requested them?

Q. No, who was present when you came to take the pictures?

A. The Chief of Police at Baltimore and also, I believe, he's the Fire Chief, Mr. Grile.

Q. Anyone else, at all?

A. And the coroner.

Q. Is that Dr. Kersell?

A. Dr. Kersell.

Q. Can you, of your own knowledge, say whether or not the body had been moved or anything had been moved in the room at the time you took these pictures?

A. Before or at the time they were taken?

Q. Before you arrived?

A. No sir, I cannot state that.

Q. Can you state whether or not the body was moved or anything had been moved in the room?

A. No sir, I cannot state whether it had been moved.

Q. So, there had been various individuals there with [Tr. 121] the body prior to the time you took the pictures?

A. I could not state that sir.

Q. Beg pardon?

A. I could not state that sir, who was in there and who wasn't in there because I was not there at the time.

Q. That's right. So, you had no way of knowing how many may have been there before?

A. No sir.

Q. And you had no way of knowing whether the body had been moved in any way or whether any articles in the room had been moved before these pictures were taken, indicated and marked for identification "State's Exhibits 1, 2, 3 and 4."

A. The Chief of Police of Baltimore, Mr. Phillips, informed me that——

Mr. Kistler: Object as to what was stated.

The Court: You asked for something on cross examination. I think he can state as to his knowledge.

Mr. Kistler: Exception.

The Court: Objection to what someone told you, that is sustained.

Mr. Kistler: Mr. Webb——

A. Yes sir.

Mr. Kistler: I believe that's all.
Mr. Morehart: Nothing further.

[Tr. 122] Redirect examination.

By Mr. Morehart:

Q. Well, I do have one further question, if the Court please. Mr. Webb, from the time you arrived there, was anything moved until these pictures were taken?

A. No sir.

Q. I mean, was the body moved until these pictures were taken?

A. No sir. I insisted if they moved anything, let me get a picture before they moved it.

Q. Of course, the bed was torn up for you, in order for you to get pictures of the body, is that right?

A. That's right. It was intact when I got there.

Q. It was intact when you got there. According to picture No. 4, that is Plaintiff's Exhibit No. 4 there, that is the way the bed appeared when you got there, is that correct?

A. Yes sir.

Mr. Morehart: That's all.

The Court: Let me ask a question. Was number four taken, Mr. Webb, before 1, 2, and 3?

A. Yes sir.

The Court: Is that what I understand?

A. Yes sir.

Recross-examination.

By Mr. Kistler:

[Tr. 123] Q. Mr. Webb, was the bed taken apart when you were there?

A. Yes sir.

Q. When you first walked in, was there a coverlet on the bed?

A. Yes sir. Bedspread.

Q. And who dismanteled the bed?

A. Officer Phillips and the Fire Chief, Mr. Grile, and myself.

Q. Anyone else——

A. Not to my knowledge.

Q. helped in the dismanteling of it?

A. No sir. The coroner was there, but I don't believe he helped.

Q. Was the body moved in any way when the bed was dismanteled, when you were there?

A. No sir.

Q. Did anyone check the body while you were there to determine if there was life in the body?

A. The coroner did.

Q. While you were there?

A. Yes sir.

Q. How did he make his check?

A. That's a medical question, sir, and——

Q. No, I'm asking for exactly what took place. Did [Tr. 124] he check the body before the bed was dismanteled or after the bed was dismanteled?

A. He looked at the body, under the bedspread. And then we took pictures. We took pictures before he looked.

Q. When did he check the body to determine if there was life?

A. After we lifted the mattress and springs and stuff off the bed.

Mr. Kistler: That's all.

Mr. Morehart: That's all. Nothing further.

(Witness excused)

(Dr. L. L. Kersell called, but off floor temporarily)

HERMAN WILLARD, being first duly sworn, as provided by law, was examined and testified as follows:

Direct examination.

By Mr. Morehart:

Q. Will you state your name please?

A. Herman Willard.

Q. Where do you live sir?
A. At Baltimore.
Q. Do you have a street address?
A. 220 Fremont Street.
Q. How long have you lived there?
[Tr. 125] A. Around forty-two years.
Q. What relation were you, if any, to Gladys Willard?
A. Husband.
Q. Did she live with you there at the Fremont Street address?
A. She did, yes.
Q. Directing your attention sir, to July 29th of this year, —let me withdraw that question. Mr. Willard, are you employed?
A. I work for a farmer, Adam Poff.
Q. How long have you worked for him?
A. I've worked off and on for around twenty years.
Q. Were you employed for him during the month of July this year?
A. Yes sir.
Q. Are you still employed with him?
A. Yes sir.
Q. What are your hours of work?
A. Anywhere from six in the morning until around eight o'clock at night.
Q. Mr. Willard, directing your attention to the July 29th of this year, I'll ask you whether or not you went to work that day?
A. I went to work.
Q. Do you know what time that you left to go to work?
[Tr. 126] A. Around six o'clock.
Q. Did you have breakfast before you went to work sir?
A. I had breakfast.
Q. When did you have breakfast?
A. Well it was about a quarter of six when my wife and I sat down for breakfast.
Q. Did your wife eat breakfast with you?
A. Yes sir.
Q. Do you know what you had for breakfast?
A. Yes sir. I had corn flakes, and she most always ate bran or all-bran or shredded wheat and stuff like that.
Q. Did she have breakfast food that morning for breakfast?

A. She had breakfast food that morning, yes sir.
Q. And you say you ate breakfast about a quarter to six?
A. Yes sir.
Q. And she had breakfast with you?
A. Yes sir.
Q. Did anyone else eat breakfast with you?
A. No sir.
Q. Was anyone else staying at the house at this time?
A. My oldest son.
Q. What is his name?
[Tr. 127] A. Jack Willard.
Q. Was he up at this time?
A. No sir.
Q. I mean had he arisen at this time?
A. He gets up around—about ten minutes after six.
Q. When did you leave for work that morning, Mr. Willard?
A. Around six o'clock.
Q. About six o'clock. About how far do you have to go to go to work?
A. Around a mile.
Q. How do you go?
A. Go by car.
Q. Is it your car? Do you drive?
A. I've got two cars, yes sir.
Q. Does anyone go with you?
A. No sir.
Q. On the morning of July 29th, when you got to work approximately what time would you say?
A. I would say around six o'clock.
Q. How long would it take you to go out there?
A. About three minutes.
Q. Where is this in relation to your home?
A. In relation to my home, you mean Adam Poff's.
Q. Yes. Where is this place that you work?
[Tr. 128] A. Well, you go north of town and it's the first green house to the left-hand side.
Q. Now, Mr. Willard, when did you return home that day?
A. I returned home around two o'clock.
Q. Two o'clock when?
A. In the afternoon.

Q. In the afternoon. Why did you return home at that time?

A. Because my wife's sister called me.

Q. Your wife's sister, and who would that be?

A. Genevieve—Genevieve Anderson, but her husband's dead.

Q. Genevieve Anderson, your wife's sister called you, and do you know why she called you?

A. Yes sir.

Q. Why?

A. She called me. She said my wife was missing.

Q. Is that why you went home?

A. That's why I went home.

Q. Did you notify your employer?

A. Did I what?

Q. Did you notify your employer?

A. I did. We were working. We were combining oats and we broke a stick on the reel, and we were fixing that, [Tr. 129] and Adam Poff's wife and daughter came up and got me in her car.

Q. And you came home?

A. I came down to Adam's home place, and I took my car and came on in.

Q. You came down to Adam's home place. Where had you been combining?

A. On Adam's home place, on his home place on his farm. We were combining oats back there.

Q. Approximately what time would you say it was when you arrived at your home?

A. Pretty close to two o'clock.

Q. Pretty close to two o'clock, and what did you do?

A. I went back and hunted all on this side of the railroad, and so I came all through back there, and I was all in and I came back up to the house and said to my youngest son's wife, I said, "Call the Emergency Squad."

Q. You said to the youngest son's wife. Who was she? Do you know her name?

A. Oh——

Q. Would it be Lula?

A. Lula is right.

Q. Lula Willard?

A. Lula Willard.

Q. Was anyone else hunting for her?

[Tr. 130] A. Yes.

Q. When you got home?

A. My wife's sisters and two husbands—two of them, Mary and Aurilla and their husbands were back hunting.

Q. And you joined them?

A. I joined them.

Q. How long did you continue to hunt for her?

A. I suppose for around three-quarters of an hour.

Q. Then what did you do?

A. I came back up to the house. I walked back up to the house, and I told Lula, I said, "You call the Emergency Squad." And she did.

Q. Did the Emergency Squad come?

A. It did.

Q. How soon?

A. I suppose about twenty minutes.

Q. What was done after the Emergency Squad came?

A. They went back and they hunted. Well, first Elwood came in, and he said, "Mr. Willard, you sure——

Mr. Supman: Object to statements of Mr. Phillips.

The Court: Objection sustained.

Mr. Morehart: You won't be able to tell us what somebody else told you, just what you did, what was done that you know of.

A. We went in the house, and we searched the house [Tr. 131] all over, and we came back out then. And so they talked to me awhile, the Emergency Squad, and they said they'd go down and then they got another bunch and they went down.

Q. Now went down, went where?

A. Went down over and across and hunted clear back over to the other road.

Q. When you say that they went down, where do you mean?

A. They went north of my house where I live down over across to where the Fairfield Paper Company uses for a dump.

Mr. Morehart: Yes?

A. And crossed back over across the railroad and all up through Motz's and down through, clear through to the other road.

Q. Why did they go back through there?

A. They were hunting for my wife.

Q. I know that sir, but why would they search this locale?
A. They thought maybe she went back to pick berries.
Q. Are there a bunch of blackberry bushes there?
A. Yes. She went back there quite often.
Q. To pick blackberries?
A. Yes sir.
Q. That's where they were looking for her?
[Tr. 132] A. Yes sir.
Q. Did they find her?
A. No sir.
Q. How long did they search?
A. I suppose they searched up till around 7:30.
Q. In the evening?
A. In the evening.
Q. Was it beginning to get dusk at that time?
A. Dusk, that's right.
Q. What did you do after that, Mr. Willard?
A. I stayed at the house, around the house.
Q. Let me ask you, first, I think, you made the statement that when the Emergency Squad came that you searched the house, is that right?
A. That's right.
Q. When you say "the house", what house do you have reference to?
A. The house where I live in.
Q. Your home?
A. Yes.
Q. After approximately 7:30 in the evening, you say, when the search was discontinued, what if anything was done then, if you know of sir?
A. I was sitting over at Barbers' yard——
Q. Now where is Barbers' yard?
[Tr. 133] A. Right across the street from me.
Q. From you. Okay.
A. And so my son who lives in Lancaster, Robert, and his wife came over and she says——
Mr. Morehart: Now, they won't let you say what she said. You can tell us what you did or what was done, but——
A. Well, I was sitting in Barbers' yard, and so—I was sitting over there in the yard, so Mr. Barber was with me and Mrs. Barber was with me.

Q. Do you know whether or not your wife was found that evening sir?

A. She was found across in the Whittington home.

Q. Where is that in reference to your home?

A. It's catty-cornered across the left from where I live.

Q. Across the street at an angle?

A. At an angle.

Q. From where you live?

A. Yes sir.

Q. Your home is on what side of the street?

A. On the right hand side of the street.

Q. I know, but on which direction, east or west?

A. East.

Q. East side of the street, and the Barbers' home is where?

[Tr. 134] A. The west.

Q. On the west side directly across. Now where is the Whittington home in reference to the Barbers' home?

A. Just right south.

Q. Right south, and it would be on the west side of the street also, is that correct?

A. Yes.

Q. Were you in the Whittington home that evening?

A. No sir.

Q. You did not see your wife that evening?

A. Only time I saw her was when they carried her out and put her in the ambulance.

Q. Did you see her at that time?

A. No sir.

Q. You didn't see her?

A. No sir. They had her covered.

Q. I see. Mr. Willard, when you left for work that morning, did your wife appear to be in good health?

A. Good health.

Q. I mean, was there anything wrong that you noticed, anything out of the ordinary, anything at all that you noticed?

A. Nothing wrong.

Q. Do you know what day of the week this was?

A. Day of the week this is? This is the second.

[Tr. 135] Q. No, no. No, no. That this occurred sir. Do you know what day this was?

A. 26th of July, wasn't it?

Q. No, I think not, but what I'm thinking of, do you know whether or not it was Monday, Tuesday, Wednesday, Thursday, Friday or Saturday?

A. It was on Friday.

Q. On a Friday. To your knowledge, does your wife have a routine that she follows on Fridays?

A. Yes sir.

Q. What is it?

A. Goes to town, to Lancaster, always does. Gets groceries for her mother and gets groceries down here at Lancaster for her aunt.

Q. She goes to town every Friday?

A. Every Friday.

Q. Do you know whether or not she had plans to go shopping this Friday, the Friday that she was missing?

A. She was supposed to go up home and take her sister.

Q. She was to go get her sister?

A. Yes sir.

Q. Which sister?

A. Genevieve, the one who's at home.

Q. Genevieve?

A. The one who is at home living with her mother.

[Tr. 136] Q. Do you know when she was to go get her?

A. Ten o'clock.

Q. Ten o'clock. Does your wife drive?

A. Yes sir.

Q. What kind of car does she drive?

A. She was driving a Pontiac, a '56 Pontiac, blue.

Q. A blue '56 Pontiac. Do you know where it was parked?

A. In the driveway.

Q. On the morning that you left, that is, I believe, the 29th of July, was it parked in the driveway?

A. Yes, parked in the driveway.

Q. Which side of the house is this driveway?

A. South.

Q. South side of the house?

A. Yes.

Mr. Morehart: You may cross examine.

Cross-examination.

By Mr. Kistler:

Q. Mr. Willard, what is your age?

A. Sixty-three.

Q. What was the age of your wife on July 29th, 1966?

A. Sixty-three.

Q. When you left the home in the morning, who was in the home with your wife?

[Tr. 137] A. Just my oldest son.

Q. No one else?

A. No sir.

Q. Was there a relative from Florida visiting with your family?

A. She's a visitor.

Q. And where was that relative?

A. She and her husband was up to her mother's.

Q. Now I believe you said you told your younger son to call the Emergency Squad, or words to that effect?

A. No. My youngest son's wife, Lula, called the Emergency Squad. I told her when I come back from hunting down there, I told her to call the Emergency Squad, and she did.

Q. Mr. Willard, at any time immediately prior to this date, had your wife threatened to commit suicide?

A. No sir. My wife wouldn't do that.

Q. Mr. Willard, did you and your wife have a quarrel on the morning of July 29th, 1966?

A. No sir.

Q. Had you been quarreling with her?

A. No sir.

Q. I'll ask you if you and your wife had—strike that. I'll ask you if your wife had threatened to separate from you and leave you?

[Tr. 138] A. No sir.

Q. On the morning in question, July 29th, 1966, did she have her clothes packed?

A. No sir.

Q. Did she have any of her clothes packed?

A. No sir.

Q. I'll ask you if on this particular morning, if you and your wife did not have a quarrel before you left the home?

A. No sir. No sir.

Q. And I'll ask you if in mornings and evenings immediately prior to July the 28th, or the week before that, July 29th——

A. No sir.

Q. —if you and your wife had not had loud arguments in your home?

A. No. Well, we had little arguments just like anybody else, but we didn't have no loud arguments.

Q. Did you have arguments?

A. No, not then.

Q. None at all?

A. No sir.

Q. You're saying that under oath, Mr. Willard?

A. Yes sir, I'm saying that under oath.

Q. Would you have had arguments such as could have [Tr. 139] been heard by the neighbors in the locality?

A. Well, I don't know. We've had little arguments maybe when it comes to that, but not anything—I loved that woman, and I wouldn't touch that woman.

Q. Mr. Willard, what type of work did you do for Mr. Poff?

A. I worked on the farm, made hay, and plowed, and planted corn, and whatever you're supposed to do on the farm.

Q. Did your work for your employer require you to leave these premises?

A. No.

Q. Mr. Willard, on 8-16—at 8:16 o'clock a.m. on the morning of July 29th, 1966, did you drive your car to your home?

A. Did I drive my car to my home?

Q. Your car?

A. Yes.

Q. All right. What were you doing there at your home at 8:16 on the morning of July 29th, 1966?

A. I drove over. Adam Poff told me to go over and check some sweetcorn over to Millersport, and that was between twelve and twelve-thirty when I went over there.

Q. I'm talking about 8:16 in the morning. What did you drive your car to your residence for? For what reason? [Tr. 140] To your residence?

A. My residence?

Q. Your residence?

A. I don't know, what I mean, if I was home at my residence at that date because I could not tell you if I was over home.

Q. Mr. Willard, on the 29th day of July, 1966, was your wife the owner of a little dog?

A. My wife, the owner of a little dog, no sir.

Q. Was there a dog on the premises?

A. There was a dog on the premises, but he belongs to Jack Willard, my son.

Q. I'll ask you if on July 29th and in the few days preceding that date, if that little dog went with Mrs. Willard wherever she went?

A. Yes sir, when she'd let it loose, what I mean, when she'd go down to pick berries that dog was following her.

Q. All right sir. Then you came back you said to your home on the 29th at two o'clock in the afternoon?

A. Yes sir.

Q. You testified to that a moment ago?

A. Yes sir.

Q. Did you see the little dog?

A. No sir.

[Tr. 141] Q. You didn't?

A. No sir.

Q. You knew where the dog was, didn't you?

A. In the garage.

Q. Where was it?

A. In the garage. That's where we keep it most of the time.

Q. To refresh your memory, Mr. Willard, wasn't that dog tied up over at Bondurants?

A. Not that I know anything. It was loose and I don't know who got it and brought it over. I couldn't tell you who brought the dog over.

Q. All right. Where was the dog when you came back this occasion you said at two o'clock in the afternoon?

A. It was in the garage.

Q. It was in the garage?

A. Yes sir.

Q. Was it tied?

A. No sir. We just leave it loose in there.

Q. Was it confined?

A. No sir.

Q. Where is the Bondurant's residence?

A. It is down the next street below my place, the one that runs pass the ball field, and it's the second house to the west.

[Tr. 142] Q. Do you know of your own knowledge, if on the morning of July 29th, 1966, that that dog was tied in the Bondurant yard?

A. I don't know anything about that cause I wasn't there.

Q. Did you see the dog on the morning of July 29th, 1966?

A. No sir.

Q. Do you know where the dog was on the morning of July 29th, 1966, when you left your home?

A. It was in the garage.

Q. Did you see the dog in the garage that morning?

A. No sir.

Q. Beg pardon.

A. No sir, I did not.

Q. Then how did you know it was in the garage?

A. Because I knowed it was in the garage. That's where it is now. I fed it this morning.

Q. What kind of car were you driving on July 29th, 1966?

A. A '52 Dodge. I've got two automobiles.

Q. What color is the Dodge?

A. Green.

Q. Is there on the Dodge any plaque or anything to indicate the type of car that it is?

[Tr. 143] A. Yes. It was a '52 Dodge.

Q. I mean, on July 29th, 1966, was there any marking of—any insignia to show that it was a Dodge automobile?

A. Yes, it's got an emblem on the front end, "Dodge".

Q. Where is that sir?

A. On the front end.

Q. On the front end?

A. Yes.

Q. Does it say Dodge?

A. Yes sir.

Q. You mean on the front part of the radiator, or the hood, whatever it is?

A. Yes sir.

Q. Are you positive that there is some identifying marking of "Dodge" on the front of your car——

A. Yes sir.

Q. —or are you positive there was on July 29th, 1966?

A. Yes sir.

Mr. Kistler: I believe that's all.

Redirect examination.

By Mr. Morehart:

Q. I want to clarify something. Mr. Willard, on the morning of July 29th, that is the day your wife came up missing,——.

A. Yes sir.

[Tr. 144] Q. —I believe, you stated that you left your home around six o'clock in the morning, is that correct?

A. That's right.

Q. Now then, were you ever back at your home that day——

A. No sir.

Q. —from the time you left, up until two o'clock in the afternoon?

A. No sir, I was not.

Q. Were you away from the Adam Poff farm where you went to work from the time that you arrived there in the morning, you say, around six or a few minutes after, until noon?

A. In the afternoon, Adam told me to go over and check some sweetcorn over at Mrs. Bright's, that's Mary Kate's mother, and I went over there between twelve and twelve-thirty and come back from there and went up to the home-place and I was cleaning up in the yard when he come up.

Q. Now, tell me this. Were you away from the Adam Poff place from the time that you arrived there in the morning, this is on July 29th, the day your wife was missing, were you away from the home, I mean from the Poff place where you were working, up until the time that you went to check the sweetcorn about twelve or twelve-thirty?

[Tr. 145] A. No sir, I was not.

Q. You were not away?

A. No sir.

Q. I think you stated on cross examination, Mr. Willard, that—you may have become confused or something. They asked you whether or not you were back at your home around 8:16 in the morning.

A. No, I wasn't back at my home from six o'clock until

noon. And I wasn't back there until six o'clock up till two o'clock till my wife's sister called me.

Q. You were not back at your home at any time?

A. No sir. I wasn't back at my home.

Mr. Morehart: I think that's all.

Recross-examination.

By Mr. Kistler:

Q. Mr. Willard, the night before July 29th, 1966, was your wife over to the Whittington home?

A. Now, I couldn't tell you. She told me she was going. I couldn't say she went over there. I couldn't say that.

Q. All right. To refresh your memory, did not your wife go to the Whittington home to have Mrs. Whittington put up her hair?

A. Well she said she was going. I couldn't say that she went. I couldn't say that.

[Tr. 146] Q. Well, did Mrs. Willard have her hair fixed on the night of July 28th, 1966?

A. I guess she did. I don't know, what I mean, whether she went over there or not. I couldn't say that.

Q. Were you at home the night previous?

A. I was out to Adam Poff's.

Q. Beg pardon.

A. I was out to Adam Poff's.

Q. Didn't you come home for your evening meal on July 28th, 1966?

A. I come home in the evening. I don't get home until around eight o'clock, maybe a little later.

Q. Did you see your wife when she went to bed that evening?

A. Yes sir.

Q. July 28th?

A. Yes sir.

Q. All right. Had she had her hair done?

A. Well, I couldn't tell you. I didn't pay that much attention because she had a hairnet on her hair.

Q. Now on the morning of July 29th, 1966, did you eat breakfast with her?

A. Yes sir.

Q. Had her hair been recently combed or put up?

A. She had her net over it. When it comes to that, [Tr. 147] I know that because I kissed her that morning before I left.

Q. Mr. Willard, you are acquainted with Buddy Whittington?

A. Yes sir.

Q. Had he ever visited in your home?

A. He's come over there. What I mean, he's come to the door, as far as the door, but I don't know if he's come in when I wasn't there or not. I couldn't say that.

Q. Did your wife visit in the Whittington home?

A. She was over there.

Q. Was your wife and the Whittingtons close friends?

A. I guess they was.

Q. Was your wife a good friend of Buddy Whittington?

A. Yes sir.

Q. Were the Whittingtons friends of yours?

A. Yes.

Q. Did your wife to your knowledge give Buddy a dollar for his birthday, the birthday being July 23rd?

A. I couldn't say that. I didn't hear her say that. I could not tell you that.

Q. But the relationship between Buddy and the Whittingtons and you and your wife had always been very close, hadn't it?

A. I waved at them when I went back and forth, out and in, but I never went over a whole lot, over to the [Tr. 148] Whittingtons. My wife has, I guess, but I never.

Q. On July 29th, 1966, was your son living with you in your home?

A. Yes sir.

Q. Was he separated from his wife?

A. Yes sir.

Q. What was the relationship between your son and your wife?

A. All right.

Q. Did they quarrel?

A. No sir.

Q. Now, Mr. Willard, you testified awhile ago on direct or on cross to begin with, that at 8:16 you did drive your car back to your home?

A. Well, I don't—I may have said something there I

shouldn't. I don't know. I come back in home every once in awhile, but I don't know if that was the date or what, but I was in yesterday at noon, in home.

Q. Mr. Willard, isn't it possible that you did drive your car back to your home——

A. I wouldn't say.

Q. —at 8:16?

A. I wouldn't say.

The Court: When you talk about—Let's make it clear what this 8:16 is. Is that the 16th day of August, [Tr. 149] is that what you mean or what?

Mr. Kistler: No, at 8:16 o'clock a.m. on July 29th, 1966, did you drive your car back to your home?

A. I could not tell you if I drove back or not.

Q. Beg pardon.

A. I could not tell you if I drove back home or not. I come in every once in awhile, in back home, and I tell Adam I'm coming to town.

Mr. Kistler: That's all.

Redirect examination.

By Mr. Morehart:

Q. Mr. Willard, I think we've got to clear this up. On the day your wife was missing, do you know whether or not you came back to the home that day?

A. I didn't come back home that day.

Q. And if that was the 29th day of July, then you were not back home?

A. I was not back home.

Mr. Morehart: I think that he's misunderstanding, your Honor.

Mr. Kistler: Are you finished with——

Mr. Morehart: Yes, I'm finished.

Recross-examination.

By Mr. Kistler:

Q. Mr. Willard, a moment ago, the first time you [Tr. 150] said you did and then you just now told me you couldn't say.

A. I wasn't back home there that day.

Q. Let's ask you again. On July 29th, 1966, at 8:16 o'clock a.m., did you not drive your car to your home?

A. I didn't drive my car that day home. I drove my car back when my wife's sister called out to Poff's and I drove back home around two o'clock.

Q. I'm not talking about two o'clock. I'm talking about 8:16 o'clock a.m.——

A. No.

Q. —as I was previously——

A. No.

Q. —when I asked you the first time.

A. No, I didn't drive back home.

Q. Where did you drive your car at 8:16 o'clock a.m. on the morning of July 29th, 1966?

A. I drove it out to Adam Poff's.

Q. I believe you testified in the first instance that you drove out to Adam Poff's at six o'clock that morning?

A. I drove out to Adam Poff's six o'clock that morning. I didn't drive it out, what I mean, through the day. I was out there up until two o'clock and my wife's sister called me and said your wife's missing, and she brought me back to Adam's home-place, and I got in my car and drove it home.

[Tr. 151] Q. Yes, I understand you said that when Mr. Morehart questioned you a moment ago. What size farm is the Poff farm?

A. Well, he's got seventy some acres up to his home-place.

Q. Where do you park your car at the Poff farm?

A. I usually park it over to the north or park it over next to the garage.

Q. Did you see your car at all times after you drove it there?

A. Seen it? Well, I seen it, what I mean, when I was there, and we were up to the other place working up there and when we came down at noon, we very seldom come down until noon, we eat our dinner. It was out there all the time until I was called.

Q. And if anyone drove your car to your home at about 8:16 o'clock a.m. on the morning of July 29th, 1966, it would have had to be you, would it not?

A. I didn't drive it.

Q. Beg pardon.
A. I didn't drive it in the morning.
Q. Did you loan it to anybody else?
A. No sir.
Q. Would you have the keys to the car?
A. Keys were in the car.

[Tr. 152] Q. Now, Mr. Willard, is your recollection of what happened on July 29th, 1966, rather hazy in your mind now?
A. No sir.
Q. Could it be that you drove your car at 8:16 o'clock a.m. on the morning of July 29th, 1966, to your home——
A. No sir.
Q. —or in the close vicinity of your home?
A. No sir.
Q. Why did you say so awhile ago when I first asked you that?
A. Well, I didn't understand your question.
Q. What was it?
A. I didn't understand the question, but I wasn't in all forenoon.
Q. Did you see your wife at or about 8:16 o'clock a.m. on July 29th, 1966?
A. No sir.
Q. Did you see the dog at that time?
A. No sir.
Q. What did you and your wife quarrel about in the last few months, Mr. Willard?
A. We didn't quarrel.

Mr. Morehart: I object.
The Court: Objection sustained.

[Tr. 153] A. We didn't quarrel about nothing.
Mr. Kistler: What did you and your wife quarrel about in the last week prior to July 29th?
A. We didn't even quarrel.
Q. Never did?
A. Oh, we had a few little arguments, not quarreling.
Q. Now what were the arguments about?

Mr. Morehart: I object, your Honor.
The Court: Objection sustained.
Mr. Kistler: Did you go on any mission of any kind for your employer in your car on or about 8:16 o'clock a.m.——

A. No sir.

Q. —on the morning of July 29th, 1966?

A. No sir.

Q. Who were you working with that morning at approximately between six and eight o'clock in the morning, the 29th?

A. I work with Adam Poff.

Q. Anyone else besides Adam Poff?

A. Jerry Searles was out there.

Q. Where you were working?

A. We were working up at the other farm.

Q. Where is the other farm?

A. It's up north of Baltimore.

Q. How did you go——

[Tr. 154] A. It's——

Q. How did you——

A. It's——

Q. Excuse me.

A. It's on 64.

Q. How did you go to the other farm on that morning?

A. Adam in the pick-up.

Q. Who went with you to the other farm?

A. I and Adam.

Q. Mr. Willard, did you know on July 29th, 1966, that Buddy Whittington's parents, Mr. and Mrs. Whittington, were going to be out of town?

A. Well, they said—they were down to my brother's funeral, and they said they were going to leave the next morning. They were down to the funeral home, down there to see my brother. My brother was laying there, what I mean, laying there dead.

Q. Did you see the Whittingtons leave their home on July 29th, 1966?

A. No sir.

The Court: Please talk a little bit more distinct, Mr. Willard. You're holding your hand in front of your mouth, and it's a little bit difficult here with the acoustical conditions to hear you.

Mr. Kistler: When you left your home at six o'clock [Tr. 155] a.m. on July 29th, 1966, was the Whittington car in the garage?

A. I don't know.

Q. Did you see the Whittington car?
A. No sir.
Q. Did you go by the Whittington home?
A. No sir.
Q. Which way did you go to work?
A. I backed out, and I went north and made the jog and went over and hit Oak Street and from there on out.
Q. Mr. Willard, you've known Buddy Whittington all his life, have you not?
A. Well——
Q. Known him for a good while?
A. Known him for a good while.
Q. Has he always been a good boy, to your knowledge?

Mr. Morehart: Object your Honor. I don't think that has anything to do with this.

The Court: I don't think it has either. Objection sustained.

Mr. Kistler: You ever have any trouble of any kind with Buddy Whittington years ago?
A. No sir.
Q. Did your wife ever have any trouble with him?
A. I couldn't tell you that. She never said anything [Tr. 156] about it.

Mr. Kistler: That's all. Nothing further.

(Witness excused)

Dr. L. L. Kersell, being first duly sworn, as provided by law, was examined and testified as follows:

Direct examination.

By Mr. Morehart:

Q. Will you state your name?
A. Dr. Lloyd Kersell.
Q. Where do you live sir?
A. 130 Union Street, Lancaster.
Q. You are a doctor of medicine?
A. Yes.
Q. How long have you been a doctor of medicine?

A. Since 1925.

Q. You have practiced medicine since that time, doctor?

A. I have.

Q. You are the coroner of this county?

A. I am.

Q. How long have you been the coroner of this county?

A. Approximately five, six years, between five and six years.

[Tr. 157] Q. Now doctor, did you—directing your attention to the 29th day of July of this year, did you have occasion in your official capacity as coroner to be called to the Village of Baltimore?

A. I did.

Q. Where did you go in Baltimore?

A. I do not have the address. I went to a home near the school in Baltimore. I was directed that way.

Q. Why were you called there?

A. I received a call from the Sheriff's Office saying that Chief Phillips said that he had a case that he wanted the coroner called on.

Q. What did you observe when you got there?

A. When I reached the Village, I didn't know just where the place was. I drove around the square and then I noticed a lot of automobiles on this street——

Court Reporter: Just a minute please.

(Recess to change tape)

Mr. Morehart: I'm not just exactly sure where we left off, doctor, but I think I had asked you what you found when you arrived at this home in Baltimore, I believe.

A. I think I left you in the street. I was able to find a place to park eventually, and was conducted into the home by Chief Phillips, and I asked him why I had been called and what was the story, and he said to me——

[Tr. 158] Mr. Kistler: Object to any statements.

Mr. Morehart: Doctor, you can't tell what apparently someone else said so you just tell what you observed and what you found and what you did.

A. There was a body of a woman underneath a bed. The head of the woman was toward the foot of the bed. We discussed briefly what we should do, and it was the opinion

of all of it would be best if we removed the bed clothing, the mattress and springs, bed slats, so that we not disturb the body and——

Q. Did you examine the body before this was done, doctor?

A. I looked under the bed, but you could see very little except to see there was a woman there. But you could see very little.

Q. Could you observe whether she was alive or dead?

A. She was dead.

Q. I mean, you could observe that all right?

A. Yes.

Q. All right then, tell us what you did please, if you will please.

A. The men did remove the bedclothes, the mattress, springs, and slats, and I proceeded to examine the body. Of course, first of all, we took—some pictures were made of the body so that we would have a record of the body [Tr. 159] before I touched the body.

Q. Doctor, I would like to hand you some photographs which for purpose of identification have been marked State's Exhibits 1, 2, 3 and 4. Would you examine those please? Are the pictures marked 1, 2, and 3—State's Exhibits 1, 2, and 3, the pictures of the woman, is that the woman you're talking about?

A. Yes, that is the body of the woman.

Q. And State's Exhibit 4, which is a picture of, I believe, of the bed and was that the condition of the bed when you arrived there, doctor?

A. Yes.

Q. Or at least approximately so?

A. Yes.

Q. All right. Now, I believe you stated that you then removed the bed clothing and the springs and mattress, is that correct?

A. The men in the room did that.

Q. They did that for you, and you made an examination of the body, is that correct?

A. Yes.

Q. Do you know whose body this was, doctor?

A. I was told by Chief Phillips it was the body of a Mrs. Willard.

Q. That's the same body shown in those photographs? [Tr. 160] A. Yes.

Q. All right. What were your findings as far as your examination of the body, sir?

A. I examined the body, and I found that the—most of the body heat had been lost from the body. The arms were cold, and the torso still had some heat, but there had been considerable loss of heat. Post-mortem rigidity was complete. Post-mortem lividity was quite marked.

Q. When you talk about post-mortem lividity what do you have reference to, doctor? I'm sure that everybody wouldn't understand.

A. After death the superficial subcutaneous blood vessels relax and dilate. The blood that is in the body seeks a level and settles to the dependent portion. In the case of a woman like this lying on her back, this blood is on the back and on the sides, and this process was complete because there was a marked line of demarcation between the area of the skin in which the dilated blood vessels were and the skin that had no dilated blood vessels.

Q. Doctor, does that appear, does that show up on either of those photographs?

A. Yes. It shows here very well.

Q. Would you point out to the Court please just exactly what you're talking about so the Court will have some idea. [Tr. 161] A. The post-mortem lividity that you see along the back and, of course, as we contrast the normal skin on the anterior surface of the body.

Q. Now what, if anything unusual, did you observe about the body, doctor?

A. I noted that from my estimation of these factors, the loss of blood and the rigidity, or the post-mortem rigidity, and the post-mortem lividity, the completeness of it, and I estimated the time of death as approximately twelve hours. Now that means it is near twelve hours, but there would be a leeway of an hour each way, approximately more if it were longer. I noted that there were some marks on the woman's neck, and I drew the attention of the officer, Officer Phillips, to those and the condition that I saw on the neck, and I had him make—I had the photographer make photographs of these.

Q. Doctor, what time did you examine the body, do you know approximately?

A. It was approximately a quarter till nine.

Q. And you are estimating then, in your opinion, based on what you saw there in your examination, that this body had been dead approximately twelve hours prior to that time, is that correct?

A. I would say twelve hours approximately, but eleven hours or over.

[Tr. 162] Q. Now doctor, can you tell us approximately, based upon your examination, approximately how long she had been in this position that you found the body, on her back?

A. That number of hours.

Q. That number of hours?

A. Yes.

Q. In other words, she had been in that position on her back approximately, you say, roughly twelve hours prior to that?

A. Roughly twelve hours. Approximately twelve hours.

Q. And not only been in that position that long but had been dead for that period of time, is that correct?

A. That's true.

Q. Now doctor, did you, in your capacity as coroner, sir, did you establish the cause of death of this woman?

A. At this time, I was quite confident as to the cause of death, but inasmuch as this would have to be—certain things would have to be proved by post-mortem examination, I made no statement to anyone except to Officer Phillips. He did say to me——

Q. What was your tentative diagnosis, I mean in your own mind, doctor?

A. Homicide by strangulation. The assailant was behind the woman as he strangled her.

Q. What if anything did you do to confirm this? Did [Tr. 163] you have an autopsy performed?

A. I ordered an autopsy performed by University Hospital.

Q. What were their findings of autopsy as to the cause of death?

A. The autopsy confirmed the cause of death was asphyxiation due to strangulation.

Q. This strangulation occurred where?

A. At this, I presume, at this home.

Q. No, no, no, no. I mean on the body.
A. Strangulation of the neck, manual strangulation.
Q. Of the neck?
A. Yes sir.

Mr. Supman: We move that other remark be stricken from the record.

The Court: What other remark are you talking about?

Mr. Supman: "Presume in the home".

The Court: That will be stricken.

Mr. Morehart: Did you observe anything else unusual about the body, sir? How was it clothed?

A. I noted that the body, the slip and the dress were pulled up exposing the abdomen. I noticed that her undergarments, panties, I guess they call them, were pulled down in front, and when we turned the body over, they were pulled down some in the back. There were also a [Tr. 164] few more marks on the woman, I haven't called your attention to.

Q. You tell us sir.

A. There were some marks which—small scratch marks on her hands and——

Q. What hand, do you know?

A. I cannot recall that sir.

Q. Okay. What kind of marks were they? When you say "scratch marks", would you try to describe them for us please?

A. They were linear marks about a quarter inch or slightly more in length.

Q. Did they look like they had been cut or caused from——

Mr. Kistler: Object. Leading question.

The Court: Well, he can describe them.

A. I cannot testify as to what caused them.

Mr. Morehart: No, no. But I mean what would have—how would these marks that you saw normally be caused, can you tell us that? What would cause these kinds of marks?

Mr. Kistler: Object.

Mr. Morehart: What could cause these kind of marks?

The Court: What could cause them, I think, is a proper question.

A. External violence. Something sharp pushing [Tr. 165] against the skin.

Mr. Kistler: Ask the answer be stricken.

The Court: Overruled.

Mr. Morehart: Did you notice anything else about the body?

A. The shoes were off the body. They were lying as shown in the photograph. The woman's glasses were—and her hair net were off the body. They were lying underneath and to the side. Her lower denture was out and to the right of the head on the floor.

Q. Did you notice any bleeding?

A. There was a slight amount of blood from the right side of the mouth, very slight, coming down on the face.

Q. Doctor, did that blood have the appearance of having come from the lungs or anything like that?

A. No, I cannot testify to that. All I can tell you is that there was blood.

Q. Anything else that you observed, doctor?

A. The clothing of the woman was—the way the body was lying I wondered how the woman had gotten in this position. The woman was not pushed under the bed. She—The woman's clothing was, if she had been pushed under the bed, it would have been drawn to the side. But from the appearance of her clothing and my observation, the bed had been moved and this body had been placed underneath the [Tr. 166] bed and then the bed had been replaced over the body. She could not have been pushed under this bed and her clothing remained in the way that I had seen it.

Mr. Kistler: We object to the answer and ask that it be stricken. It is conjectural and problematical and a conclusion on the part of the pleader and prejudicial.

Mr. Morehart: And may I remind the Court that this is the coroner, and it is his duty to investigate, your Honor.

The Court: Objection overruled.

Mr. Morehart: Doctor, the photographs that you see there, 1, 2, and 3, do they correctly show the body at the time that you first saw it, doctor? I mean, when the bed was removed so the body would be visible?

A. They do.

Q. Now, doctor, would you give us your opinion of how this strangulation that you speak of as having caused the death, how this might have occurred, sir. I mean, whether it was, I think you said something about manual strangulation, or was there any evidence of any instrument, a rope, cord, wire, anything like that, used to cause the strangulation?

A. No, there was no evidence——

Mr. Kistler: Object. It is a leading question.

Mr. Morehart: It is not leading. I've asked——

The Court: Objection overruled.

[Tr. 167] A. From the marks on the woman's neck which I directed the attention of the police officer to, the one which I judged to be a thumb mark and the others on the front of the neck, the marks of finger marks, I assumed that the assailant had been behind the woman as he strangled her, and later this was confirmed by the coroner's report that I received, that the woman had some broken ribs and, from this, I would assume that the woman had been held against some object such as the bed or a dresser, and the assailant had pushed against her as he strangled her, fracturing the ribs and strangling her at this time.

Mr. Kistler: Ask that the answer be stricken if the Court please. It's conjecture on the part of the witness.

The Court: This is the coroner, and he's giving his opinion about it. Overruled.

Mr. Morehart: Doctor, was there any evidence that any instrument of any kind was used in this strangulation?

A. No.

Mr. Morehart: You may cross examine.

Cross-examination.

By Mr. Kistler:

Q. Doctor, while you've been testifying as to what you observed about the body of the decedent, were you testify-

ing from your recollection or from your observation of the photographs that you were holding in your hands [Tr. 168] when you testified?

A. From my personal recollection which is still vivid.

Q. Do these photographs that you have in your hand, and that you did have in your hand while you were testifying, indicate any of the items which you testified to from recollection?

A. The dentures I believe that's this, I'm not sure. The hairnet and glasses, I can't see here. They were under the bed actually. It doesn't show in the photograph, I don't believe. The clothing, of course, which I have told you about shows here, the position of the body on the back. There is a shoe which shows. There's another, I believe.

Q. Do the pictures which are marked State's Exhibits 1, 2, 3, and 4, indicate any marks on the person of the decedent?

A. These photographs that I have here do not show those marks. Those were small and do not show in these pictures. Except, I believe, here's one on the neck which shows in this picture. Yes, because there was one there, and there were some along in here.

Q. Doctor, was any examination made by you to determine if there was any poison or anything of that type in the body of the decedent?

A. This was done at University Hospital by the [Tr. 169] pathologist. There was no poisons or drugs.

Q. Doctor, from your examination of the decedent, Mrs. Willard, would it have been possible for her to have committed suicide?

A. Impossible.

Q. Beg pardon.

A. Impossible.

Q. Why do you say that, doctor?

A. Well, she couldn't have strangled herself. That's impossible to leave these marks. And she couldn't—she wouldn't have broken her ribs on both sides of her chest before committing suicide. To me, it is impossible.

Q. Doctor, when you first came to the Whittington residence, was not the possibility of suicide mentioned to you?

A. No.

Q. Before you left, was not that possibility mentioned to you?

A. I don't recall anyone mentioning suicide to me. I was——

The Court: You're just to respond to the questions, doctor.

Mr. Kistler: You say you don't recall?

A. No, I do not recall.

Q. Doctor, do you know if this body had been [Tr. 170] moved in any way before you were called to the scene?

A. I can—What was that question again please?

Q. Do you know if the body had been moved in any way before you arrived at the location of the body?

A. From the time the body was placed here, you mean?

Q. Yes.

A. No, I cannot testify to that except—No, I cannot testify to that.

Q. Who was there when you arrived at the location that you saw the body?

A. Officer Phillips and a number of men from, I believe, the Fire Chief and there were many people in the street. I don't know who they were.

Q. Doctor——

A. The parents at this home, the man and wife and son were there.

Q. Looking at this, which is marked State's Exhibit 1, is that the way you saw the body when you first came?

A. After the top of the bed was removed. Yes, that is the way that I saw the body.

Q. When you first came, was the body exposed like this with the top part of the bed being away?

A. Yes.

Q. So the bed had been removed when you came?

A. No, I—The body was underneath the bed, and we [Tr. 171] discussed the matter as, that we should remove the bed so that we not disturb the body, so we could examine it without moving it.

Q. Is there any way that you can tell or could you tell from what you observed if the bed could have been in any other position other than what you found it when you came there with the body under it?

A. Well, it was a very small bedroom, and I could see only

one place for the bed with the arrangement of the furniture and that was the place it was, the position it was.

Q. Could the body, in your opinion, have been someplace else other than in the position that you found it at any time after the death occurred?

A. It is quite possible. I do not know where she was killed.

Q. Doctor, could death have occurred more early than the time that you estimated that it did occur?

A. That is true.

Q. How much more early would you say?

A. I would say eleven to sixteen hours or more.

Q. Beg pardon.

A. Eleven to sixteen hours. The length of time after the rigidity is complete and after post-mortem lividity is complete, then there's considerable period that [Tr. 172] matters stay about the same condition. The body, putrefaction in other words, does not start except for some hours.

Q. Doctor, could death have occurred at some other location than where you see the body as shown in State's Exhibit 1?

A. It could.

Q. Also, is there any way to tell, doctor, how long the body had been in the particular location as is indicated in State's Exhibit 1?

A. From the post-mortem lividity, the body had not been moved since it was placed in this position.

Q. Doctor, could the body have been at some other location in this same position and moved over to the location as shown in State's Exhibit 1?

A. That's true.

Mr. Kistler: I believe that's all if the Court please.

Mr. Morehart: I think that's all.

The Court: Let me ask a question. It may be in the record, and I didn't get it. But, at the time of doctor's examination, did he say nine o'clock?

Mr. Morehart: A quarter till nine, I think he said.

Dr. Kersell: Approximately a quarter till nine.

The Court: At night, of the 29th, is that right?

Dr. Kersell: At night.

The Court: That part of it, I'm sorry gentlemen, I [Tr. 173] didn't get.

(Witness excused)

Dr. Francis Edward Cuppage, being first duly sworn, as provided by law, was examined and testified as follows:

Direct examination.

By Mr. Morehart:

Q. Will you state your name please?

A. Francis Edward Cuppage.

Q. And where do you live sir?

A. Columbus, Ohio.

Q. What is your profession or occupation?

A. I'm a physician.

Q. What are your qualifications as a physician?

A. I'm a pathologist. I graduated from Ohio State University Medical School in 1959, took my internship and training at Western Reserve University in Cleveland until 1963, then I took a fellowship in Cleveland in Research and Electrokymography until 1965, and then I joined the staff of Ohio State University in July of 1965, Department of Pathology.

Q. Doctor, did you have occasion to perform an autopsy on a female woman by the name of Gladys Willard on or about the 29th or 30th of August of this year?

[Tr. 174] Q. Or July, excuse me, of July?

A. Yes. May I refer to my notes?

Q. Oh yes, sure you may.

A. We performed an autopsy on Gladys Willard on the 30th day of July, 1966, at approximately nine o'clock in the morning.

Q. Now, doctor——

Mr. Supman: Excuse me. May I ask, what time was that?

A. Nine o'clock.

Mr. Supman: Nine o'clock a.m.

A. A. M.

Mr. Supman: The date, sir, again.

A. July 30th, 1966.

Mr. Morehart: Now, you performed this for whom sir?

A. This was for the coroner of Fairfield County, Dr. Kersell.

Q. And did you determine the cause of death?

A. Yes, we did. We determined the cause of death—The cause of death was asphyxiation due to strangulation.

Q. Now will you tell us please if you will what your autopsy revealed?

A. We found evidence of excoriations on the neck. We found hemorrhage, hematoma within the soft connective tissue of the neck. We found fractures of the hyoid bone, [Tr. 175] a portion of the larynx. In addition, we found hyperemia and dilatation of the blood vessels in the upper portions of the trachea and esophagus. We found evidence of hemorrhage in the scalp, below the scalp, and in the scalp overlying the skull.

Q. Now where was that Doctor?

A. This was over the vertex of the upper portion of the skull.

Q. Could you indicate on your own head where that would be.

A. It would be like so.

Q. How large an area was that?

A. It would be an area of approximately ten centimeters in diameter.

Q. What, Doctor, could cause something like this or would cause something like this?

A. This could be caused by several things. It could be caused by anoxia or lack of oxygen within the blood vascular system. It could be caused by trauma to the area involved.

Q. In your opinion and based upon your examination of this, what would be your best opinion as to what would have caused this?

A. I think in this case, this would more likely be caused by trauma due to the fact that the area was larger than

[Tr. 176] small with little hemorrhages we usually see with lack of oxygen. I think that it would be probable that this is a traumatic related incident.

Mr. Kistler: Object and ask that the statements as to the probabilities be excluded, that part of the answer as to the opinion based on probabilities.

The Court: As I remember, the Doctor said that the condition that he found and in his opinion from those conditions. I think that when he said "probably", he means that predominantly that's caused by, it comes from a certain thing. Objection overruled.

Mr. Morehart: Doctor, would a blow on the head cause something like this?

Mr. Kistler: Objection. It is a leading question, if the Court please.

The Court: That's all right. He's describing this injury.

A. It could.

Mr. Morehart: Would this condition which you have found here be caused by a sharp instrument, a blunt instrument, or what kind of instrument would you think a blow on the head would cause such an injury as this?

A. I think if this were due to a blow on the head, it would be a blunt rather than a sharp instrument.

Q. Was there any wound in the scalp of the head that [Tr. 177] you could observe?

A. We found no wound.

Q. Is that your reason for saying it would probably be a blunt instrument rather than a sharp instrument?

A. Yes.

Q. Very well. What else now did your autopsy reveal?

A. In addition to the changes that I have already noted in the esophagus and trachea in the neck, we found again focal hemorrhages in the area of the peritoneum, on the inside of the peritoneal cavity. Apparently at one time she had a hysterectomy. We found absence of the uterus and the distal portion of the cervix, and, in the area where the uterus is normally housed, we found evidence of hemorrhage in the soft tissues in that area. Examination of the

vaginal secretions revealed only aging cells and no evidence of spermatozoa. We found——

Q. Doctor— Excuse me.

A. We found excoriations on both hands, on the dorsal or upper aspects of both hands, and we found hemorrhage in the medial aspect of the left upper arm area, so approximately five centimeters in diameter.

The Court: May I ask sir so that I understand. You mean in the underneath part of the arm, is that Doctor?

A. Yes, on the underneath and inner aspects of the arm.

[Tr. 178] Mr. Morehart: How much did you say, Doctor, the measurement?

A. Approximately five centimeters.

Q. How long would that be?

A. I'm sorry. We use centimeters. It would be about, maybe four inches or so, maybe a little less.

Q. A hundredth of a meter, is that right?

A. 2.56 centimeters in the inch. Figure it from that.

Q. All right. Now could you tell about this injury to the arm from outside observation of this arm?

A. Only that it was probably related to a blunt injury of some sort, but otherwise I don't think you could do much more with it.

Q. Could you observe it from the arm itself?

A. Yes.

Q. You could. What if any other injuries did you find?

A. We found fractures of the ribs on the left and the right sides. The right third, fourth, and fifth ribs and the left sixth rib were fractured, and there was evidence——

Mr. Kistler: We'll have to object to this witness testifying from typewritten notes.

The Court: He can refresh his memory. You can look at them if you like.

Mr. Kistler: But they aren't in his handwriting.

[Tr. 179] The Court: Are these your notes?

Mr. Morehart: It's his autopsy.

The Court: He's talking about his notes. Do you object? It's overruled if you do. Proceed Doctor.

A. These—surrounding these areas of fracture were hemorrhages into the soft tissue.

Mr. Morehart: That means what?

A. It means—It is evident to us then that this hemorrhage, or fracture or trauma occurred before the patient had actually stopped the heartbeat.

Q. I see. Before she had died?

A. That's correct.

Q. That the injury occurred before?

A. Yes.

Q. All right. Anything else, Doctor?

A. We found a few incidental findings, a hypernephroma, which is a neoplasma or tumor of the right, or correction, of the left kidney, and a small tumor of the right kidney. I think this was essentially all we found. We found some evidence of arteriosclerosis.

Q. In your opinion, would those have any effect upon her death?

A. No.

Q. Doctor, I notice that you, from your autopsy report, you show hyperemia of the larynx and of the trachea, [Tr. 180] I believe you testified to this. For the purpose of the Court, I don't know, but would you tell the Court what that means.

A. The presence of dilatation of the blood vessels above a point of constriction leads us to think that there definitely was a point of constriction. Now by hyperemia or dilatation of the blood vessels, I mean that the blood flow back to the heart from the head was obstructed by a constricting change in that area. So, if one were to constrict the blood vessels, this would stop the flow of blood back to the heart. The flow of blood on the opposite side of the constriction would be limited, and the blood would pool in the area, unable to be drained back into the heart. This is evidence to us that this is a constricting type of injury, which we feel is that form of strangulation. In other words, constriction of the areas of the neck which would stop the blood flow back into the heart and dilate the blood vessels in the neck and in the head.

Q. In other words, blood coming from the heart would force a dilatation of the blood vessels up to a point where it is constricted, is that right?

A. Well, the blood—It is much more difficult to obstruct or constrict the blood flow into the head so that usually continues, those are the arteries, and one usually does not constrict those. But in the type of constriction [Tr. 181] that we're referring to, the obstruction to the flow of blood back to the heart, this is much easier to constrict. And blood flows into the brain and the head, but it is unable to get back through the neck into the chest and into the heart.

Q. That's what causes the condition which you call hyperemia? Is that right?

A. That's correct.

Q. Doctor, did you observe any wounds around the neck?

A. There were two or three small excoriations approximately, oh maybe, three-quarters of an inch in length on the anterior aspect of the neck, mainly on the right, but I think there was one small one on the left side. This was the only other thing.

Q. In your opinion, Doctor, and based upon your examination, how would this strangulation have been caused?

A. I think in this instance, the strangulation would much more likely be caused by either a soft instrument, or a piece of material, or by the hands, rather than the ligature type of strangulation which we so commonly see and which would be a belt, or a rope, or a chain, which almost invariably leaves marks upon the neck. We found no evidence of constricting marks from a belt, a rope, or a chain type of material. It would be my opinion that this [Tr. 182] would be more likely, probably either a soft material or the hands or perhaps the forearm.

Q. I see. Doctor, did you have occasion to examine the contents of the stomach of this woman?

A. Yes, we did. There were approximately 50 cc's or a little over an ounce of partially digested food within the lumen or the hole in the stomach. This material consisted of almost completely digested vegetable fibers, with no evidence of meat, and other partially digested fluid content.

Q. Doctor, do you have an opinion as to how long it had been, based on your examination, how long it had been before this food had been eaten?

A. I would think that this would place it in a time span from one and a half to three hours following the ingestion of the food.

The Court: Did I understand that that condition of the food would—Go ahead. Maybe you're getting to what I want to know.

Mr. Morehart: Can you tell us, Doctor, approximately how long that food had been eaten prior to the death of this woman?

A. I think by examination of the material and seeing or attempting to define how much digestion had occurred that this likely had been ingested or eaten approximately [Tr. 183] one and a half to three hours. Now, I think it's very difficult to be more certain exactly, a closer time interval, but I would think that the interval most certainly would have occurred from one and a half to three hours after the food had been taken in the stomach.

Q. Would her death now have stopped that digestive process?

A. It stops it almost completely, but I'm sure there is a little digestion that will continue on by the material that is actually secreted at that time into the stomach. But within —almost all the digestion stops——

Q. At the time of death?

A. At the time of death, right.

Q. Now, have you any way, Doctor, based upon the autopsy that you have, have you any way of determining the approximate time of death of this woman?

A. I can give an estimation of the time of death by several factors. The fact that we received the body in the Franklin County Morgue at approximately midnight or twelve a.m. on the 30th of July. At that time and at the time of autopsy, there was a moderate amount of rigor mortis, which is the hardening of the limbs and the rigidity of the muscles supporting those limbs, that is found after death. The amount of this rigor mortis and the amount of the pooling of the blood into the body would lead me to think [Tr. 184] that the time of death was sometime between midnight or twelve a.m. on the morning of the 29th and three to four in the afternoon of the 30th. In addition to this——

Mr. Supman: Three to four a.m. or p.m.?

A. P.M., the afternoon of the 30th. So this is as close as I can tie it with the information of the livor mortis and the

rigor mortis. The additional information as to the time of death I think must come as far as I am concerned, related to the ingestion and partial digestion of food within the stomach.

Q. You are of the opinion though that death occurred someplace from one and half to three hours after the ingestion of this food, is that right?

A. Yes.

Q. So, if you knew when that food was ingested, then you would be able to pretty closely predict the time of death then, is that correct?

A. That's correct. The time of death prediction is difficult from the livor mortis because of the transportation of the body and the time I gave you, I gave you the broad expanse of time because I wanted to cover the times that could exist there. It's much more important to us to determine when the patient ate the last meal and then try to estimate the time of death from the last meal if we can determine when that meal was ingested.

[Tr. 185] Q. And if you know the kind of food, I presume, also?

A. Yes, that's correct.

Q. Assuming, I believe, you said that you found only vegetable matter in the stomach, is that correct? I mean, no meats or fats or anything like that, is that correct?

A. That's correct.

Q. Would that digest more quickly say maybe than meats or fats possibly?

A. I think it would depend too much upon the type of vegetable matter. Celery and things like that take a much longer time to digest. The loose vegetable matter such as cereal and meal take a shorter period of time. So, I think one must know the type of food we're dealing with before we can——

Q. Let's assume that this person had—that the contents in her stomach came from dry cereal of some kind, a wheat cereal, a dry wheat cereal of some kind, would that make a difference as to the time of digestion?

A. Yes, I think material like that would be digested relatively rapidly.

Q. In what period of time, would you say?

A. Digestion begins very rapidly after the food is taken into the stomach, and it is nearly complete by three or four

hours; and the stomach usually empties all of its material into the tube leading from the stomach within four [Tr. 186] hours. So, in this particular instance, it would be one and a half to three hours after the ingestion of the food, such as cereal.

Q. To the condition that you found on autopsy, Doctor, is that correct?

A. That's correct.

Q. The condition that you found on autopsy in your opinion, would it have been the same as existed there at the time of her death?

A. I think it very closely resembles the material at the time of death.

Q. I see. Would you again, Doctor, give us your—Let me withdraw that question. Doctor, was any examination made for drugs or barbiturates or poisons of any kind?

A. Yes, we did what we call our routine toxilogical examination, which we do on almost all the coroner's autopsies; and we found that there was no evidence of barbiturates, no evidence of alcohol, and no evidence of the narcotic drugs, such as cocaine, codeine, demerol, morphine, and strychnine.

Q. What was your final diagnosis then, Doctor, as to the cause of death?

A. Our final diagnosis was asphyxia due to strangulation.

Mr. Morehart: I see. You may cross examine.

[Tr. 187] Mr. Supman: Could we have a few minutes, your Honor?

(Defense counsel confer with defendant)

Mr. Kistler: We have no questions of the Doctor.

The Court: Anything further?

Mr. Morehart: No. Thank you very much, Doctor.

(Witness excused)

JACK WILLARD, being first duly sworn, as provided by law was examined and testified as follows:

Direct examination.

By Mr. Morehart:

Q. Will you state your name please?
A. Jack Willard.
Q. Where do you live?
A. 220 Fremont, Baltimore.
Q. Are you employed?
A. Employed at Defense Construction Supply Center, formerly Columbus General Depot.
Q. What is the nature of your employment?
A. I'm the Records Management Officer for the D. C. S., sir.
Q. For D. C. S.
A. Defense Construction Supply Center.
Q. These initials throw me. You hear so many of [Tr. 188] them. Are you related to Gladys Willard and Herman Willard?
A. Mother and father.
Q. Now how long have you been living with your mother and father?
A. I would say since last October, around October when I was legally separated.
Q. I see. Now, directing your attention to July 29th of this year, were you living there at that time?
A. Yes.
Q. Did you have occasion to see either your mother or your father on the morning, on the early morning hours of July 29th.
A. I did not see my father. He usually got up about 5:30 and left for Adam Poff's. I did not see him. I did see my mother.
Q. What time did you arise that morning, if you know?
A. It was about twenty minutes after six, or somewhere around there, quarter after.

The Court: Is that word "arrive"?
Mr. Morehart: Arise.
The Court: Oh, "arise". I'm sorry.

Mr. Morehart: What did you do after you got up?

A. Cleaned up, shaved and cleaned up, and dressed and got ready to go to work.

Q. Did you eat any breakfast?

[Tr. 189] A. Just a cup of coffee.

Q. Was your father there at that time?

A. No.

Q. Was your mother there at that time?

A. Yes.

Q. Where was she?

A. She was in the kitchen. She was the one who awakened me and prepared the coffee.

Q. Now, when did you leave for work, do you know?

A. I would say approximately ten minutes till seven. It was usually about twenty till or a quarter till when I left, but this morning it was a little bit late. I left about ten till.

Q. Who was there when you left?

A. Just my mother.

Q. What was she doing when you left?

A. As I was ready to go out the door, she was on the telephone talking to my aunt, Mrs. Anderson.

Q. And how do you go to work? How do you get to work?

A. I usually go up 256.

Q. No. I mean what means do you get there?

A. I drive my car.

Q. Your car, and what kind of a car do you drive?

A. 1963 Buick Wildcat.

Q. Do you take anybody with you to work?

A. I don't take anybody from home with me. I pick someone up at the edge of Columbus.

Q. Do you do that every morning?

A. Yes, I have a rider.

Q. What day of the week was this, do you recall?

A. What day of the week was what?

Q. We're talking about the 29th of July.

A. Friday.

Q. Friday. How did you go to Columbus that morning?

A. The route you mean?

Q. The route, yes.

A. I usually go out 256, and turn at the Snyder Church Road, I guess that is what it's referred to, and go up to 204 and then take the County Road straight up past Grace-

land, I don't know what that County Road is, but I usually go that way, up to 204 and then straight shoot into 256.

Q. Did you pick anyone up this morning, on this morning we're speaking about now?

A. Yes sir.

Q. Do they work at the same place you do?

A. Yes, same office.

Q. What time did you get to work?

A. I would say about several minutes before 7:45 [Tr. 191] I'm not precisely sure, but it was no later than 7:45.

Q. When are you to start to work?

A. At 7:45.

Q. At 7:45, and how long do you work?

A. Until 4:15.

Q. How long did you work this day, do you recall?

A. Well, I worked until I would say about twenty minutes till four. I got a telephone call from my father, and I got the call, I would say, a little after three, and I left about twenty minutes till four.

Q. Now, had you left the plant at any time from the time that you arrived there around 7:45 until you left to come home at about twenty minutes till four?

A. Well, other than lunch, a half four for lunch.

Q. Where do you go for lunch?

A. Usually one of the restaurants around there close. There in Town and Country or someplace close.

Q. How long do you have for lunch?

A. A half hour.

Q. A half hour. What time do you go to lunch?

A. Usually a quarter to twelve, around there.

Q. And with that exception, you were there all the time that day?

A. Yes.

Q. You came home early this day, you say [Tr. 192] as the result of a telephone call, is that correct?

A. Right.

Q. What did you do after you came home?

A. Just started looking.

Q. Started looking for what?

A. My mother.

Q. You had a report that your mother was missing, is that true?

A. Yes. My father called me at work and told me she was missing.

Q. Was there anyone else looking when you arrived home?

A. Yes. My aunts and quite a number of people, I don't recall who all. Then the airplane got out and started looking. But three of my aunts were there and my father and my brother, all looking.

Q. How long did you continue to look?

A. Until dark.

Q. Approximately what time was that would you say?

A. Well, it would be an estimate. I would say probably until around eight o'clock because we had gone clear back to the other road at the covered bridge, County Road there, through the cornfields and so forth. So, I mean I don't know for sure, but I'd say it was close to eight o'clock.

[Tr. 193] Q. Now, what did you do after that?

A. As we were coming back across the field, the neighbor, Mr. Barber, met us and said they had found my mother.

Q. You comtinued coming on home then, is that correct?

A. Yes.

Q. Now did you—do you know of your own knowledge whether your mother had made any arrangements to go away that day?

A. Yes, she told me she was going to pick my aunt up and go to Lancaster.

Q. Do you know what time she was supposed to go?

A. Around ten, approximately.

Q. Would that be in the morning or the afternoon?

A. That would be in the morning.

Q. Did she drive the car?

A. Did she drive a car?

Q. Yes.

A. Yes. She drove a car.

Q. What kind of car did she drive?

A. She usually drove the Pontiac.

Q. What model and year is that?

A. '55 or '56. I think it's a '56.

Q. Did you observe this car when you left in the morning?

[Tr. 194] A. It was sitting right beside the back door in the driveway.

Q. In the driveway. Did you observe this car when you came home from work that day?

A. Right.
Q. Where was it?
A. Same identical place.
Q. Did you look in the car at any time?
A. I looked in the car after I arrived home.
Q. Was there anything in the car?
A. Some water bottles and some things she was going to take to my grandmother. I don't recall what else, but I know there were several jugs of water because the water was too hard there on the farm so they took water up for my grandmother.
Q. Were these bottles full of water?
A. They were full.
Q. Is this where the car is usually parked?
A. Yes, in the driveway.

Mr. Morehart: You may cross examine.

Cross-examination.

By Mr. Kistler:

Q. Mr. Willard, how long have you known Buddy Whittington and his parents?
A. Well, I don't know for sure. I'd say ten years, [Tr. 195] approximately, something like that. I don't know.
Q. Did you ever know of Buddy and his parents visiting in your mother's home?
A. Well, I was never there that I recall when they did.
Q. Did your mother ever visit in the Whittington home?
A. Well, just infrequently.
Q. They were good friends during the last few years, that is, your folks and the Whittingtons?
A. Yes.
Q. Did Buddy and your mother always get along all right to your knowledge?
A. To the best of my knowledge.
Q. Mr. Willard, on the night of the—on the 28th day of July, 1966, do you know if your mother was over to the Whittington home?
A. No, I don't.
Q. Do you know whether or not she had her hair done that night of the 28th of July, 1966?

A. She did have her hair done, yes.

Q. Do you know who did it?

A. No, I don't.

Q. Mr. Willard, did you see her in the morning eating breakfast before you left for work on the morning of the 29th?

[Tr. 196] A. I did not see her eating breakfast, no.

Q. How was she dressed if you recall?

A. She had a housecoat on. I don't recall; I think it was orange or yellow, some light color.

Q. How was her hair when you last saw her?

A. She had a thing over her head. I didn't pay too much attention. It had been recently done or set, something. I don't recall.

Q. Mr. Willard, calling your attention to the morning of the 29th, were you on three different occasions on that morning in the Whittington yard?

A. The 29th?

Q. On the 29th?

A. No, I was not.

Q. Were you there in the yard at any time on the 29th? In the morning, that is, sometime between six o'clock and twelve o'clock noon?

A. No.

Q. Did you pick up anything from the lawn in the Whittington yard at any time between six o'clock in the morning and twelve o'clock noon?

A. No.

Q. Did you return to the home of your parents at any time after you left in the morning?

A. I did not.

[Tr. 197] Q. Were you in the locality at any time on the 29th after you left?

A. Not before three or ten minutes till—around four o'clock, whenever I got home, I don't remember. But not before that.

Q. Is there anyone in the immediate neighborhood in which your parents live and in which the Whittington home is located that closely resembles you?

A. Not that I'm aware of.

Q. What kind of car does your father drive?

A. To work?

Q. Well, on the 29th day of July, 1966, what type of car was your father driving?

A. A Dodge.

Q. Describe the car for us, if you will.

A. Well, I'm not sure of the year. It's somewhere around 1949 or '50. The fenders are rusted. It's strictly a second car, a work car. It's green, greenish color, and I don't even recall whether it's two door or four doors. It's a green colored car.

Q. Do you know what year it is?

A. I'm not sure.

Q. Is there any chrome on the car?

A. No. I don't believe so. The chrome has all been taken off.

[Tr. 198] Q. Is there anything on the car to indicate the make of car that it is?

A. I'm not sure of that. It's a Dodge. I've driven it. I know it's a Dodge, but I'm not sure if the name-plates are on it.

Q. Mr. Willard, on the morning of the 29th of July 1966, did you see your father at all?

A. Not until I arrived home around four o'clock or a little after four, I guess.

Q. Mr. Willard, on the 29th or within two or three days just immediately prior to that date, did you hear any quarreling between your mother and father?

A. No.

Q. Hadn't there been any quarreling between your parents during the last few days before the death of your mother?

A. None that I heard.

Q. Did you hear your mother in the last few days threaten to move to Florida?

A. I beg your pardon.

Q. Did your mother—did you hear her say at any time in the few days preceding her death that she intended to move to Florida?

A. Not me.

Q. Did she tell you at any time around the time of [Tr. 199] her death, or immediately prior thereto, that she didn't know how she could go on living with your father?

A. Absolutely not.

Q. Did you hear her make that statement?

A. I did not hear her make that statement.

Q. Mr. Willard, how long have you been living in the home?

A. I would say since October, somewhere around there. I'm not sure of the date.

Q. Would you at any time, since you've been living there, been quarreling with your mother?

A. No.

Q. If there was any quarreling in that household that could be overheard, it would not have been you and your mother, is that correct?

A. Perhaps you better define "quarreling". I'm not clear on that.

Q. All right. Loud, antagonistic shouting between two parties that could be heard at least a hundred yards away.

A. There's nothing I recall. I was not involved in any type of quarreling like this.

Q. All right. Were your mother and father, when you were home, involved in any such quarreling?

A. No.

[Tr. 200] Q. Did they quarrel at all?

A. Occasionally.

Q. Could it have been heard as much as a hundred yards away in the summertime?

A. Well, I don't know. I couldn't say.

Q. As much as two hundred feet from your mother's home?

Mr. Morehart: Your Honor, I have to object. I don't really see the purpose of this. He said he didn't know.

The Court: He said he didn't know about the distance of a hundred yards. Go on and ask your question. Let's hear what it is.

Mr. Kistler: Could it have been heard as much as two hundred feet, the quarreling?

A. If all the windows were up, possibly.

Q. On the morning of the 29th or on the day preceding, do you know if your mother had packed her clothes to leave her home?

A. Would you repeat that please.

Q. Do you know if on the 29th of July, 1966, or on the day immediately preceding or within two or three days before that, if your mother had commenced to pack her clothes to move from the home?

A. Absolutely not.

Q. Had she done any packing at all?

[Tr. 201] A. No.

Q. That you know of?

A. No.

Q. Could she have commenced packing in suitcases?

Mr. Morehart: I object, your Honor. He's answered this question.

The Court: He answered that. He said no.

Mr. Kistler: Mr. Willard, on July 29th, 1966, was there a little dog in your mother's home?

A. There is no dog in the home. There is a dog on the property, my dog.

Q. I'll ask you if, from your knowledge, if that little dog followed your mother wherever she went?

A. No, I wouldn't say the dog followed her wherever she went because she kept the dog normally tied unless she was going blackberry picking or walk over to the dump to take some trash or cans over there. This is the only time normally she untied the dog. In the daytime, she tied the dog, or at night she tied the dog out in back. In the morning, she would loosen the dog and bring it and put it in the garage because the dog howls. It has long hair, and the heat bothers it, so she would take it loose in the morning and put it in the garage.

Q. Now, Mr. Willard, you're relating what happened when you were there at the home, aren't you?

[Tr. 202] A. I'm relating what I saw for approximately six months.

Q. All right. You leave the house what time ordinarily, in that period of time, in the morning?

A. I'd leave the house normally, I'd say, around twenty minutes till seven.

Q. You'd get back at what time?

A. That varies. I do T.V. repair on the side, and sometimes it's 10:30 or eleven o'clock. And if I have—if I'm going to some place of entertainment, sometimes it's after midnight.

Q. So you wouldn't know then, between those hours, if the dog followed her where she went or not?

A. She has remarked to me that she did not want the dog loose, and other than stating—I know she kept the dog in the garage during the day because she has remarked to me many times this is where she kept the dog in the daytime, and I have noted the dog there in the morning.

Q. Did you see the dog on the day of the 29th?

A. Yes.

Q. Where did you see it?

A. The dog was out back in the—Well, now wait a minute, pardon me. The dog was in the garage. The dog had been loose. My aunts told me they found the dog loose, and the dog was in the garage when I saw her because I looked the [Tr. 203] house over and the garage.

Q. Now, did your mother go to pick blackberries?

A. This I don't know. Apparently not.

Q. Did you ever know of her in the last—around the time of her death to go out and pick blackberries?

A. You mean on this date, the 29th?

Q. A few days before this.

A. Yes, she had been—She and the neighbor lady had picked blackberries.

Q. Did she go alone when she picked blackberries?

A. This I don't know. The last that I knew she went to pick blackberries, she went with Mrs. Estep.

Q. Do you know if she took the dog with her then?

A. I don't know.

Q. Mr. Willard, do you have children?

A. Four.

Q. In the last—since you've been living there in your mother's home, did Buddy ever play with your children?

A. Yes, I think on several occasions. I would not know when or what month. I just recall on several occasions.

Q. Mr. Willard, prior to your—Are you separated from your wife?

A. Yes.

Q. Prior to your separation from your wife, did you live just a few doors near the home of your mother?

[Tr. 204] A. Yes.

Q. And would that be near the Whittington home?

A. Well, it's not as near as my mother's. It's two doors north.

Q. Did your children ever play with Buddy then?

A. Yes, the youngest boy.

Q. Was Buddy ever in your home to visit when you lived in your home before you moved to your mother's home?

A. He was at the home to visit when I was living there with my family.

Q. How was his conduct on those occasions when he was visiting in your home?

Mr. Morehart: I'm going to object.

The Court: Objection sustained. I don't see the pertinence of that to this matter.

Mr. Kistler: We wish to proffer if the witness had been allowed to answer, his testimony would have been that——

The Court: You can proffer the City Hall, but it's incompetent. Objection sustained.

Mr. Kistler: We wish to proffer that if the witness had been allowed to answer, his testimony would have been that his conduct was good.

The Court: Anything further?

Mr. Morehart: I believe that's all.

Mr. Kistler: No, nothing further.

[Tr. 205] (Witness excused)

Aurilla Goodrich, being first duly sworn, as provided by law, was examined and testified as follows:

Direct examination.

By Mr. Morehart:

Q. Will you state your name please?

A. Mrs. Aurilla Goodrich.

Q. Where do you live Ma'am?

A. 6232 Northwest First Avenue, Miami, Florida.

Q. Where are you staying at the present time?

A. I am visiting with my mother, Mrs. Stella Brandon, Baltimore, Route 1. That's on 204, about a mile east of 158.

Q. How long have you been visiting with your mother?

A. We've been here since the 8th of June.

Q. Of this year?

A. Of this year.

Q. Were you visiting there on or about the 29th of July of this year?

A. Yes sir.

Q. Are you related to Gladys Willard of Baltimore?

A. She was my sister.

Q. She was your sister. You were familiar with where she lived in Baltimore, were you?

[Tr. 206] A. Yes sir.

Q. Now, Mrs. Goodrich, directing your attention to the morning of July the 29th of this year, were you at home at your mother's that morning?

A. Yes sir.

Q. What were you doing that morning?

A. Well, I baked two pies prior, or I mean after, the regular housecleaning.

Q. Did you make any effort to contact your deceased sister that morning?

A. Yes sir.

Q. When was that Ma'am?

A. When she didn't show up at my mother's to take my sister to Lancaster. We were expecting her about 10:30 when my sister came in from picking berries. We just thought well maybe she was a little bit late.

Q. What sister was this?

A. This is my sister that lives with my mother.

Q. And her name?

A. Genevieve Anderson.

Q. And she came in from picking blackberries. Go ahead.

A. Yes. She waited. I helped her to get ready because I thought my sister would be there before she was cleaned up from the berry patch, and then since she didn't [Tr. 207] come, my sister said about eleven o'clock she better call and tell her that she was ready, and she didn't get any answer. So we thought perhaps that she had gone berry picking, and we waited a little while and then we'd call again. First my sister would call and then I would call. And then finally my sister said that she was going to call Lula Willard, that's my sister's daughter-in-law.

Q. Where does she live?

A. She lives next door.

Q. Next door to whom?

A. Next door to my sister.

Q. Your sister Gladys?

A. Yes.

Q. Okay.

A. And ask if the car was there. And so she called and she said that she had been over at twenty till nine and Gladys wasn't there, but the car was there. So that was all the more reason why we thought that she had gone berry picking, and it was just a lovely morning to go berry picking. It was nice and cool, and my sister Genevieve is very fond of picking berries and my sister Gladys, of course, knew this; and so we figured that she perhaps thought that she might as well go pick berries, too, because my sister would get back in the fields and the time would pass and she evidently wouldn't be ready when she got [Tr. 208] up there.

Q. You stated that you tried to call your sister. I assume this was by phone?

A. That's right.

Q. A number of times, and your sister tried to call and could get no answer.

A. That's right.

Q. What then did you do?

A. About five till twelve when I put the pies in the stove, and my sister called——

Q. This five till twelve is before noon, is that right?

A. Yes. My sister said she was going to call again and have Lula check to see if she had returned. And so I said if she hasn't, my husband and I will go over and see what happened to her because we figured maybe she stepped in a hole, groundhog hole or something, and broke her ankle, and she wouldn't be back, something happened, because we knew good and well she would come or at least call if it were at all possible.

Q. What did you do?

A. So then my husband and I got in the car and went over to my sister's.

Q. When did you leave your home, do you know?

A. It was shortly after I put the pies in, which [Tr. 209] evidently would have been about ten after twelve.

Q. That you left?

A. Yes.

Q. You and your husband, you say?

A. That's right.

Q. Where did you go?

A. We went over to my sister Gladys' in Baltimore, and when we got there, we both went in and I told my husband——

Q. In where?

A. In Gladys' house. I told my husband you go down in the basement and I'll check upstairs. I'll check the downstairs and the upstairs, which really after her boys were married, she uses as an attic and not bedrooms. So, I did that, and I came down and I said did you find her, and he said "No". And then we went outside and Lula, of course, and the children were out there, and I said where did Mrs. Whittington live, because I had heard her speak so much of Mrs. Whittington, and she showed me the house. And I went over and knocked at the door.

Q. What door did you go to?

A. The front door. Because the door was closed, I was so afraid nobody was going to be home. At that time, it had warmed up and ordinarily you would think people would have the door open, and I was so relieved when the door was opened and the son came to the door. And I said, "Is your [Tr. 210] mother home?" And he said "No", that they had gone to Canton early that morning. So I told him that I was Mrs. Goodrich, Mrs. Willard's sister, and that we were expecting Gladys up to my mother's to pick up my sister Genevieve to go to Lancaster about 10:30, and she hadn't showed up yet and we were worried about her. And Buddy said she was over there that morning and brought some curlers back.

Mr. Kistler: Objection and ask that statement be stricken.

The Court: Objection overruled.

Mr. Kistler: Exception.

Mr. Morehart: Go ahead.

A. So then, I said, "I thought that your mother could tell me where she went berry picking." And Buddy says, "Why, she——

Mr. Kistler: Objection.

The Court: Objection overruled. Now just don't interrupt the witness. This line of questioning is perfectly proper, and the answers are proper, and are not barred by anything. So, you may take any exception you want of note but don't interrupt the witness.

A. I said, "thought your mother could tell me where she went berry picking." And Buddy said, "she didn't go berry picking with my mother. She went berry picking with Mrs. Estep." And I said, "Where does she live?" And he [Tr. 211] says, "You know where the green house is", and I said, "No." He says, "It's just back of Jack's." That's Jack Willard, her son. And so I thanked him and started down the walk, and when I got to the end of the walk, he said, "If you hear anything or if I find out anything", now, I'm not just certain there just which phrase he used, but he didn't complete the sentence. That's all he said,—If I hear anything or if I find out anything. So I turned around and said, "I'd appreciate it", and went on over to the house or to the car. My husband and Lula Willard and the children were still out front, and told him we were to go over to Mrs. Estep's that she could tell us where my sister Gladys went berry picking. So we got in the car and went over to Mrs. Estep's, and when I went to the door, the front door, as I always go to anybody's house, she came to the door; and I said, "Mrs. Estep?" And she said, "Yes." And I told her that I was Mrs. Goodrich, Mrs. Willard's sister, and I wondered if she could tell us where Gladys had gone berry picking. And she said, "Just a minute", she says, "until I get my bonnet, and I'll go with you and show you." And we were, of course, very glad for that. So she got her bonnet and came out and I said, "Could we drive over?", and she said, "Well, you can." So, she showed us how we could get over, naturally we wanted to go the quickest way we could. So we drove over and parked by the dump, I guess [Tr. 212] you would call it, that circular drive there. And Mrs. Estep and my husband and I got out and crossed the railroad tracks and climbed over the fence into someone's cornfield, and Mrs. Estep said, "sometimes she goes—sometimes we go this side of the cornfield and sometimes we go the other side." So I said to my husband, who has a heart condition

and I'm trying to pick the easiest way for him to go, I said, "Well, you take this side and", I said, "I'll go the other side." And Mrs. Estep says, "I'll go with you." Well, Mrs. Estep is a little older than I am and she didn't have any hose on, and I had taken time to ask my sister to throw me a pair of cotton hose, knowing how it is out in a berry patch. And then, too, I thought perhaps I could go a little faster without her, and I was anxious naturally to see if I could locate my sister who, I was sure, had fallen or had a heart attack, not that I knew anything was wrong with her heart. And so I said, "Well, now suppose you just wait here because my sister in the meantime might come back, and my husband and I would both miss her." And she said that was a good idea. So she waited there while we went to look for her. As I say, my husband went one side and I went the other and when we met I said to my husband, I said, "Suppose you go back and see if there is any word from Gladys and also maybe you better take Mrs. Estep home. She evidently is pretty tired." And so I said, "In the [Tr. 213] meantime, I'll go around this other field here." I found afterward it was a sheep pasture, and when I got around that, I came back and then I saw my husband about where I had originally left him, or left Mrs. Estep. And I called and I said, "Is there any word?" And he said, "No." And he started toward me then, and when I got to him, or I mean when we met, he said that Mrs. Estep said we hadn't gone far enough, that they picked berries still farther. So we both then started together up to the place where Mrs. Estep said. It was, I believe, an old Boy Scout Camp, and as we were there, we had passed this point and I had remarked to my husband that these berries had looked as if they had been there and I thought if my sister had been that way she'd surely have picked those because they looked very nice. And I looked across and there was Buddy. And I was, of course, kind of surprised, but I didn't think anything about it really. And he said that he had come out to help us look.

Mr. Kistler: Object and ask that be stricken.

The Court: Objection overruled.

Mr. Kistler: May I state for the record; this is the first that we've had an opportunity. You said I shouldn't object. But I would like to state and ask that any statements that she has made in this long statement "that Buddy the defendant said", we ask be stricken.

[214] The Court: That's all overruled. That's overruled as far as the evidence I've heard now.

Mr. Kistler: Is it all right, your Honor, if we object when she starts to make a statement?

The Court: You may object. You can object to this statement she's going to make now about Buddy, but it's overruled. Proceed.

A. So I said to Buddy, I said I had seen in the distance, it looked like a No-Trespassing Sign, and he said this—he told who this property belonged to and that he had seen this man. He had stopped him, he said, and I said, "Did he say he had seen anything of Gladys?" And he said "No, he hadn't." So I said that I had just remarked about those berries looked as if—I mean, if she had been by that way, she would have picked those. And so we went on and he was on one side of the briars and my husband and I on the other side, and went on up to the——

The Court: When you say "he", I don't know who you mean.

A. I mean Buddy.

The Court: Is that Buddy Whittington here, you're referring to?

A. Yes, Buddy Whittington. Buddy Whittington. Although, I might add, I didn't know his name, and I called him Dick. And he was on one side, and my husband and myself [Tr. 215] were on the other, and we got up to a fence. Oh, the next field over there was really briary and I knew my sister didn't like to pick berries in a place like that. But I could see over, oh perhaps as far as from here across the street, there were a lot of briars that could have been berry briars, and I asked Buddy Whittington if—what was over there, and he said, "Well, there was a drop-off." He said he would go over there and look. And so I

said, "My husband and I will go down this side of the fence and we'll go on in then and see if they've heard anything." And so that's what we did, and when we climbed across the fence there by the railroad tracks, why we met Buddy Whittington again, and I looked over and I thought —I said, "Our car is over there, isn't it?" And Buddy Whittington says, "You can't get through here though, down that way. You'll have to go through here." So we went through there, and we started to the car and Buddy Whittington was, I suppose, as far behind us as you are your Honor, and I said, "Dick, would you like to ride?" And he said, "Yes." And when we got to the car, he said he would ride in the back seat, and my husband said, "No, there's plenty of room in the front seat." And I said, "Sure." And so we all got in the front seat, and as we started—my husband started the car—Buddy Whittington said, "You have me mixed up." And I said, "Well, how is that?" He said, "You called me Dick and" [Tr. 216] he said, "my name is Buddy." "Oh," I said, "I'd heard my sister speak of a Dick Whittington, but I guess that was somebody perhaps her sons had known." Anyway, so we went on, and I reminded my husband that that road was very rough and when we got out about to the end of this black gravel road and ready to turn to the right onto the road past the mill, we looked down and saw Mrs. Estep and my sister, Mary Young, and her husband coming. So we got out of the car and went down over the bank to meet them to find out if they had heard anything. And they said they had not heard anything. They wondered if we had asked at the mill, mill, elevator, that is, since there's a paper mill, elevator. And I said, "I'll go over there." And "No, we hadn't asked if they had seen her go berry picking." So I went over to the mill and asked had they seen her. And they said "No", they had been there all morning, or all day, but, of course, they could have missed her, they said. So the rest had gone—my sister and Mrs. Estep had gone on back, and I told them that they hadn't heard anything. So after—well, we all went back again and looked some more and then my sister, Mildred Beard, and her husband came over. We continued to look and then we finally all went into the house to see if any word

had been heard, which hadn't. We stayed in there, oh perhaps, you kind of lose track of time, perhaps forty-five minutes or an hour maybe, and then [Tr. 217] we all—or I don't say we all. My sister Mildred, and my sister Mary, myself, and Dick Willard, and Jack Willard, and my nephew Max Anderson, went back in the field, in the berry field again to look for her, and we stayed back there until dark. We used the flashlight as we were coming in, and Mr. North joined us back there and another boy, I don't remember his name.

Mr. Kistler: If the Court please, at this time, I'd like to move that the statements in this last period of testimony made about Buddy be stricken.

The Court: And what is the basis for that?

Mr. Kistler: To allow them would be requiring the defendant to testify against himself in an indirect fashion.

The Court: What's your authority for that? Have you got any citation on that?

Mr. Kistler: The defendant in a criminal case cannot be required to testify against himself.

The Court: Based on this Miranda Case?

Mr. Kistler: Based on the principles of criminal law, Miranda Case, all the cases.

The Court: You mean to say that somebody who ultimately becomes a defendant in a case, people can't testify about what the conversations were? It that the basis of your objection?

Mr. Kistler: We're saying in view of this case, where [Tr. 218] the minor defendant had not been nformed of his rights, to permit statements as to what he made would be the same thing as requiring him to testify.

The Court: And what is your legal authority for that?

Mr. Kistler: The rights as laid down by all the federal decisions and——

The Court: What are those federal decisions?

Mr. Kistler: All decided previously. The Escobedo, the——

The Court: Escobedo doesn't say anything about that.

Here's the Escobedo Case, and I'd like for you to show me where it says that. What page does it say that?

Mr. Kistler: It's a matter of general law that a defendant cannot be required to testify.

The Court: So then it isn't in the Escobedo Case?

Mr. Kistler: I don't say whether it is or not, but I'm say-on the basis of rights established by——

The Court: Do you—Have you got any authority that you're quoting here? Are you citing it from the Miranda Case?

Mr. Kistler: On the basis of rights established, it would be——

The Court: Can you show me where it says that in the Miranda Case?

Mr. Kistler: Your Honor, you know the law better [Tr. 219] than we.

The Court: Well, you're the one who's citing it, and I'm wondering. I'm asking you.

Mr. Kistler: And we're stating that to allow statements would be to require the defendant to testify against himself.

The Court: Motion's overruled.

Mr. Morehart: Mrs. Goodrich, let's go back a moment, and I think you stated that when you came down to your sister's place and after searching the house and the basement and learning where the Whittington residence is that you went over to the Whittington residence and the person whom you know as Buddy Whittington came to the door, is that correct?

A. That's correct.

Q. Could you tell us approximately what time that was?

A. I would judge about 12:30.

Q. In other words, you said, I believe, that you left your home approximately ten after twelve, and you came down and you searched your sister's house.

Mr. Kistler. Just a minute. I'm sorry. I object. That isn't exactly—that isn't what she said.

The Court: If you will—we'll just give her the opportunity, and we'll find out what she says, Mr. Kistler. [Tr. 220] I would like to know, too.

Mr. Morehart: I believe that you stated you left your

house about ten after twelve to come to your sister's, is that right?

A. That is right.

Q. As near as you can fix the time, it was approximately 12:30 when you went over to the Whittington home and you talked to Buddy, is that correct?

A. Yes.

Q. Now, the person you saw over there, whom you have have testified to as being Buddy Whittington, is that person present here in this courtroom?

A. Yes sir. Right there (witness points at defendant).

Q. Sitting next to his mother, you mean, Mrs. Goodrich?

A. Yes sir.

Q. And that's the person whom you know as Buddy Whittington, is that correct?

A. Yes sir.

Q. Now Mrs. Goodrich, you stated, I believe, this is in order to establish our continnity here, that approximately around dark, or at least you did use the flashlight coming back in after your last search, and where did you come back to?

A. We came back to the Willard home.

[Tr. 221] A. Well, now wait. As we were coming back, we hadn't crossed the road yet, Mr. North was going back and get a flashlight, and we were going to search around the dump further. I forgot to add that. But then we saw a man coming across that field between the Willard home and the dump, and we called and asked had he any news, and he said, "Yes." So, we all—we went to meet him.

Q. Do you know who this person was?

A. Yes. I didn't know at the time, but it was Mr. Barber, next door to the Whittingtons.

Q. I see. What did you do after that, Mrs. Goodrich?

A. Then we went to the Whittington home.

Q. You went to the Whittington home?

A. Yes.

Q. Did you go inside?

A. I didn't know—I went around the side, Jack and I, and I don't know who else. I got ahead of my sisters, and I didn't know it was Mrs. Whittington at the time, but she said not to go in. And then later, I went around the front of

the house and met my sisters, and we all, of course, felt that we should see her. And so I went up the front steps, and I got in the living room, and I was met by—or some man told me I'd have to go back out. According to the picture I saw in the paper, I guess it was the Fire Department Man, Fire Department Head.

[Tr. 222] Q. All right. Anyway, what did you do then? Did you leave home then?

A. Oh, yes.

Q. Then what did you do?

A. Went over to my sister's.

Q. What, if anything further, did you do then?

A. We just sat.

Q. Did you have any further conversation with Buddy Whittington other than what you've related here?

A. No. Well, I did omit something. Going back to the time when I saw my sister Mary and her husband, and Mrs. Estep coming across that field, I told my husband——

Mr. Supman: I'll object.

The Court: Objection overruled.

Mr. Supman: Hearsay.

A. I told my husband——

The Court: She's saying what she said. Go ahead, Mrs. Goodrich.

A. I told my husband because of his heart condition that he should just go ahead and take Buddy Whittington home and just stay there. Because, I guess you all know, anybody with a heart condition shouldn't exert himself too much, and I didn't want to have to go looking for him.

Mr. Morehart: Did he?

A. Yes, he took him home.

[Tr. 223] Q. In the car?

A. In the car. But he didn't stay. He brought the car back with a jug of water.

Q. Your husband?

A. Yes.

Q. So, you had searched from the time that you came over about 12:30 until dark, is that right?

A. Yes, that's right, with the exception of that short period I was in the house.

Mr. Morehart: You may cross examine.

The Court: This testimony has been rather lengthy, and I think it is about time for another recess here.

(Fifteen minute recess)

Cross-examination.

By Mr. Supman:

Q. Mrs. Goodrich, you stated that your home was in Florida?

A. Yes sir.

Q. And you had been visiting since June?

A. That's right.

Q. During the course of your visiting with your mother, you had the opportunity to be doing a lot of visiting with Gladys?

A. Well, we talked to her on the telephone every day. She either called us or we called her.

[Tr. 224] Q. How often did you visit with her personally?

A. She would come up at least once a week, perhaps twice.

Q. Mrs. Goodrich, did your sister Gladys ever discuss with you difficulties that she was having with Mr. Willard?

A. Oh no.

Q. Was there any thought about Mrs. Willard going back to Florida and visiting with you?

A. Oh no.

Q. What were your plans about returning to Florida?

A. We will return to Florida approximately the first of February. At the present time, my husband is enrolled in Ozark Bible College in Joplin, Missouri.

Q. Were you acquainted with the fact that there were a lot of quarreling and arguing going on in the Willard home?

Mr. Morehart: I'll have to object to this, your Honor. That has not been established.

Mr. Supman: Were you acquainted if there were any quarreling or arguing going on?

A. I imagine every home has some argument.

Q. Was this discussed with you by your sister?

A. No. No sir.

Q. Are you acquainted with the dog that was in the Willard home?

[Tr. 225] A. Acquainted?

Q. Well, not on a speaking basis. But, do you remember, the dog being around there?

A. Yes. That particular day, my brother-in-law, Russell Long was leading it over to the field to help in the search.

Q. Had you ever seen the dog with your sister out in the yard and visiting around or blackberry picking?

A. No sir.

Q. Do you know if the dog would follow your sister on occasions?

A. I've been told that she always took the dog with her when she went berry picking.

Q. I see.

A. And the dog was loose at this particular time. That was another reason we thought she was berry picking.

Q. As a matter of fact, the dog liked to follow your sister about any place she went in the neighborhood, isn't that so?

A. Well, I wouldn't say that. They kept the dog tied all the time.

Q. But it was not tied that day?

A. It broke loose. The only time the dog was loose was if she'd go berry picking. She never took the dog around visiting with her.

[Tr. 226] Q. Do you know how the dog may have got out that day?

A. I understand that she had the dog tied to a tree, wherever she ties him, and he broke the rope.

Q. Do you know who told you that?

A. No sir. I do not.

Q. Someone must have.

A. I suppose so.

Q. Could Mr. Willard, the husband, have told you that?

A. No. No, that was told before we ever went back to look for her, I guess. That didn't seem important really.

Q. Was Buddy Whittington attempting to be helpful that day?

A. We thought so, yes.

Q. Were there other people like Boy Scouts, out helping

to look in the woods and berry patches trying to find your sister?

A. After the Emergency Squad were called, yes. There were Boy Scouts that helped to look for my sister. And, also, a man flew over in the airplane, if you want that.

Q. Did you answer the question as to whether you ever heard any quarreling between Mr. and Mrs. Willard?

A. Did I answer it?

Q. Yes. Did I ask you that question? If not, I will. Did you ever hear Mr. and Mrs. Willard do any quarreling?

[Tr. 227] A. Not to speak of, no.

Q. Does that mean yes or no, "not to speak of"?

A. You put your own interpretations on it.

Q. Well, I'll ask you. Yes or no. Have you heard them quarreling?

A. Years ago perhaps. But just visiting here, I don't think people are apt to quarrel when you're visiting them.

Mr. Supman: I think that's probably right. Thank you. That's all. You're excused.

(Witness excused)

LULA WILLARD, being first duly sworn, as provided by law, was examined and testified as follows:

Direct examination.

By Mr. Morehart:

Q. Will you state your name please?

A. Mrs. Lula Willard.

The Court: Will you talk a little louder please.

A. Mrs. Lula Willard.

Mr. Morehart: Where do you live?

A. 226 Fremont Street.

Q. What Village?

A. Baltimore.

[Tr. 228] Q. Are you related to, or were you related to, Gladys Willard?

A. Yes, she's my mother-in-law.
Q. She is your mother-in-law?
A. Yes.
Q. Where do you live in regard or in relation to where she lived?
A. You mean the houses?
Q. Yes.
A. Why next door to each other.
Q. You live next door?
A. Yes.
Q. Your house is immediately north of hers, is that right?
A. It is on this side. Is that north?

Mr. Morehart: Yes.

A. Yes.
Q. Okay, so you live right close?
A. Yes, we do.
Q. Do you recall the day that your mother-in-law came up missing, Mrs. Willard?
A. Yes. It was Friday, the 29th of July.
Q. I believe that's right. Do you recall that day?
A. Yes, I do.
Q. Do you recall that morning of July the 29th?
[Tr. 229] A. Yes.
Q. Did you by any chance have occasion to see your mother-in-law, Gladys Willard, that morning?
A. No, I did not. I went over to her house. It was twenty minutes till nine.
Q. Twenty minutes till nine?
A. She was not over there. I did not see her none.
Q. Why did you go over there?
A. Because she usually goes shopping on Friday. Then, I wanted to get my little girl a pair of pajamas, the only reason I went over there for.
Q. I see. You wanted to have her bring your little girl a pair of pajamas?
A. Yes.
Q. You say that was twenty minutes till nine?
A. Yes.
Q. You did not find Mrs. Willard?
A. No, she was not there.
Q. She was not there?

A. No, because I hollered, "Gladys" and "Gladys", and she wasn't there, so I went back home.

Q. Was her car there?

A. Yes.

Q. Where was it parked when you went over there?

A. It was in the driveway where she usually has it.

[Tr. 230] Q. That's where it's usually parked?

A. Yes.

Q. Did you see her at any time that day?

A. No, I did not.

Q. Did you go back any other time other than at twenty minutes of nine in the morning?

A. I think it was about ten o'clock, I went back over and she wasn't there. And then as as time went on, about a quarter of twelve, her sister, you know, Genevieve, started calling, and I sent my little girl, Susan, over because we were eating dinner—me and my husband and family were eating dinner, you know, over to Gladys'. She wanted to know if Gladys had left yet.

Q. You sent your daughter over to see if she could find her?

A. Yes, and she said grandma wasn't over there. That's what Susan told me. So we told Genevieve, Gladys wasn't over there.

Q. Could you observe whether or not her car was still there?

A. You mean, what time?

Q. When you sent your daughter over?

A. My daughter said her automobile was still there—Susan, cause we were eating dinner right at the time when the telephone call came through. Susan was the one who [Tr. 231] answered the phone, and Susan just went over. She said grandma's car was in the driveway.

Mr. Morehart: You may cross examine.

Cross-examination

By Mr. Supman:

Q. Mrs. Willard, you live right next door?

A. Yes, I do.

Q. Did you hear in the months previous, quarreling between Mr. and Mrs. Willard?

A. Now, who do you mean?

Q. Between Gladys Willard and her husband?

A. No, I did not.

Q. You never heard any quarreling?

A. No, cause I don't pay any attention to what goes on in family affairs. I'm busy with three kids.

Q. I see. Were there occasionally some noises or rumblings like people in disagreement there next door?

A. You mean over at Gladys and Herman's?

Q. Yes.

A. No.

Q. You never remember hearing any?

A. No.

Q. How about the dog? Did you see the dog that morning?

A. Yes, my little girl, Susan——

[Tr. 232] Q. And where was it?

A. Susan said it was behind the house, you know, coming to our house from grandma's house, and she said she was loose there.

Q. Is this the Willard house that it was behind, Gladys' house?

A. Yes. Our house is on the north side, and Gladys', you know, is right there. And the dog was loose, and Susan says, "Mother, grandma's dog is loose. Pep's loose." That's all I know.

Q. The dog's name is Pep?

A. Yes.

Q. Did you see any other men around the Willard house that morning before noon, two or three men perhaps, one to three men maybe in a vehicle, a truck?

A. You mean in the morning?

Q. Yes. Maybe a garbage truck?

A. No, I did not.

Q. Do you have a garbage pick-up service?

A. Yes, we do.

Q. Do the Willards have the same service?

A. You mean, Mrs. Willard, my mother-in-law?

Q. Yes.

A. No, they don't haul her garbage away.

Q. Was anyone at your house to pick up any garbage?

[Tr. 233] A. You mean—Mr. North does.

Q. Was he there at your place that morning?

A. You mean Friday morning, the 29th?
Q. Yes ma'am, that's the day we're talking about.
A. Sure he was there.
Q. About what time?
A. He doesn't have any certain time he comes there. I didn't see him there that morning.
Q. He didn't come that morning?
A. He come that morning.
Q. He came but you don't know what time?
A. No, I don't know what time because he doesn't have any certain time to come.
Q. Now, who is this man?
A. You mean, who picks my garbage up?
Q. Yes.
A. Mr. North. He hauls all the garbage around there in town.
Q. But he doesn't haul it from your mother-in-law's house?
A. No, I never—he never collects over there so he probably doesn't haul her garbage away.
Q. Can you give us any idea when you last saw your garbage that morning. How about after breakfast? Did you put some garbage out then?
[Tr. 234] A. No. I never put the garbage out. My boy always does—Jamey does. The boy always puts the garbage out for me.
Q. Do you know what time he put it out that morning?
A. He put some out maybe the night before for the garbageman to pick up last, oh, Thursday night.
Q. Was it picked up before noon that day, do you know?
A. I really don't know.
Q. Before dinner?
A. I really don't know because I didn't put no garbage out. I didn't check to see if he went or not.
Q. I gathered from what you said that it was picked up some time that day?
A. Yes. He comes around on Friday.
Q. Some time on that day, on Friday?
A. Yes.
Q. And you know it was picked up on Friday?
A. Yes. He always does pick our garbage up.
Q. But you didn't see him?

A. No, I did not see him, Mr. North.

Q. Then you weren't looking outdoors all the time, were you?

A. No.

Q. There could be comings and goings, and you not [Tr. 235] see people?

A. Yes, cause I'm busy in the house with Susan and Jamey and the little baby two years old.

Q. I suppose you have the television set on where it makes a lot of noise and it entertains the children?

A. Yes.

Q. Could this account for the fact that most of your sounds would be in the house due to the television set being on?

A. I imagine.

Q. About how many hours a day is your television set on as a rule, Mrs. Willard?

A. In the morning, it's on, I suspect, from about 8:30, maybe eight o'clock to ten o'clock.

Q. In the mornings?

A. In the mornings.

Q. What time do you people usually get up in the morning?

A. Now see, my husband has different shifts.

Q. How about that morning? That Friday, the 29th?

A. The 29th?

Q. Yes ma'am.

A. I got up to get my husband off to work. He went to work—my husband, Dick, he went to work at a quarter to seven.

[Tr. 236] Q. A quarter to seven, that morning?

A. Yes, and I went back to bed.

Q. Now, if he went to work at 6:45, what time did you get up, do you recall?

A. I got up about 8:30.

Q. Oh then you didn't get up with your husband?

A. No, I got up with my husband, but I went back to bed.

Q. You didn't get up?

A. No.

Q. But you went back to bed?

A. Yes.

Mr. Morehart: She doesn't understand. She got up, and then she went back to bed.

Mr. Supman: Did you get up when your husband got up?

A. Yes.

Q. Your husband got up or he left at 6:45?

A. He left at 6:45 because he goes to work at seven o'clock.

Q. You were up at the same time your husband was up?

A. Yes, but I went back to bed.

Q. What time did you get up that morning?

A. About 8:30. I mean, I was up when my husband was up at six o'clock, but——

Q. Your husband left at 6:45 in the morning?

[Tr. 237] A. Yes.

Q. So you were up at 6:45 in the morning?

A. Yes.

Q. Then you would have had to get up before 6:45 in the morning, wouldn't you?

A. Oh, I see what you mean now. I got up about fifteen minutes after six.

Q. All right. So you got up at 6:15?

A. Yes.

Q. Did you see any comings or goings next door of Mr. Willard, the father, or the son?

A. No, I did not.

Q. I see. You didn't hear any cars coming or going either that time of morning?

A. No.

Q. Do you normally hear them coming and going in the morning at that time?

A. You mean, my father-in-law, Mr. Willard?

Q. Yes ma'am.

A. Sometimes, if I'm up before six o'clock, I see him go; and if I'm not up before six, I don't see him go.

Mr. Supman: I see. Thank you. That's all.

(Witness excused)

[Tr. 238] ELWOOD R. PHILLIPS, being first duly sworn, as provided by law, was examined and testified as follows:

Direct examination.

By Mr. Morehart:

Q. Will you state your name please?
A. Elwood R. Phillips.
Q. Where do you live sir?
A. Baltimore, Ohio.
Q. What is your occupation or profession?
A. I'm Chief of Police of Baltimore.
Q. How long have you been Chief of Police of the Village of Baltimore?
A. Nine years.
Q. Prior to that time, what did you do?
A. Sheriff's Department.
Q. What connection did you have with the Sheriff's Department?
A. I was a Deputy Sheriff.
Q. How long were you Deputy Sheriff?
A. Two years.
Q. So, you've been in law enforcement for the last eleven years, is that correct?
A. That's right sir.
Q. Were you acquainted with Herman and Gladys [Tr. 239] Willard in Baltimore?
A. Yes sir.
Q. You knew who they were?
A. Yes sir.
Q. Do you know where they live?
A. Yes sir.
Q. Where do they live?
A. 215 Fremont Street, or 220 Fremont Street rather.
Q. 220 Fremont Street in the Village of Baltimore?
A. That's right.
Q. Are you acquainted with Buddy Whittington?
A. I am.
Q. Are you acquainted with his parents—
A. I am.
Q. —Mr. and Mrs. Orville Whittington?
A. I am.
Q. How long have you known them?

A. I have known Mr. Whittington for years, I'd say at least twenty years.

Q. How long have you known Mrs. Whittington? A number of years?

A. A number of years.

Q. And Buddy. How long have you known him?

A. I've known Buddy for six or eight years, I expect, as a child.

[Tr. 240] Q. Do you know where he lives?

A. I do.

Q. Where does he live?

A. 215 North Fremont.

Q. And that is where?

A. Baltimore, Ohio.

Q. And that's in this county?

A. Fairfield County, Ohio.

Q. Mr. Phillips, did you have occasion in your capacity as Chief of Police of the Village of Baltimore to be called to the vicinity of the Willard home on or about the 29th day of July of this year?

A. I did.

Q. And approximately when was that?

A. Approximately three o'clock.

Q. Do you know who called you?

A. Why, the Emergency Squad.

Q. Did you go there?

A. At once.

Q. What did you find when you got there?

A. We were told that Mrs. Willard was missing.

Q. What did you do?

A. We started to search for Mrs. Willard.

Q. Where did you search?

A. We searched the house, her home, the outbuildings, [Tr. 241] the shrubbery and so forth around the home. And then we went north toward the railroad and searched along a piece of ground that used to be used as a dumping ground for the Gaylord Container Corporation up there which is grown up in bushes and so forth. We searched that and north of the railroad.

Q. How long did you search?

A. Well, I'd say all together we searched about three and a half to four hours.

Q. That would have been from a little after three to maybe seven or 7:30, is that right?

A. Nearly seven, yes.

Q. Did you find Mrs. Willard during that period of time?

A. We did not.

Q. Did you—what did you do after that, Mr. Phillips?

A. After we gave up the search?

Q. Yes.

A. Well, we—I went and talked to a few of the neighbors in the community there. I talked to some of Mrs. Willard's sisters, and I talked to Mr. Willard. I talked to Mrs. Estep and to Mrs. Barber in reference to the missing woman, and the only two I could find that had actually seen Mrs. Willard was Mrs. Estep, who saw Mrs. Willard at [Tr. 242] approximately 6:30 in the morning at the rear of her lot, presumably feeding her chickens. Mrs. Estep stated that she had spoken to Mrs. Willard just briefly. I talked to Mrs. Barber. She stated she saw Mrs. Willard at 7:30 or a quarter of eight in her own yard drawing water from a hydrant, presumably for her dog.

Q. Now, after talking with these people, what did you do?

A. Well, we discussed discarding the search at the present time, at that particular time, although some of them were still searching. At approximately eight o'clock, I went home to get something to eat.

Q. By the way, had you seen either Mr. or Mrs. O. A. Whittington during this interval, before you left?

A. I saw them just before I left, yes. They came home. I can't give the exact time on that, but it was presumably 7:30 or a little bit later.

Q. You saw them where?

A. They pulled into the driveway, into their place.

Q. I see. Did you see Buddy at that time?

A. Not at that time.

Q. Not right at that time?

A. No.

Q. I believe you stated that you went home?

A. I went home.

[Tr. 243] Q. What if anything did you do after that?

A. I went home to get something to eat. At approximately 7:20, or 8:20 rather, I was called back.

Q. And what did you do?

A. Went back to the—to that particular street, and I was told they had found Mrs. Willard in the Whittington home.

Q. What did you do?

A. So, I went in the home, and I asked Mr. Whittington——

Q. Who was in the home at the time?

A. Mr. Whittington and Buddy, the Reedy boy. I don't believe I saw Mrs. Whittington in the home at that particular time. Loy Grile, the Chief of the Squad, and I went in and I asked Mr. Whittington where the body was, and he said, "in the bedroom." Mr. Grile and I went into the bedroom and checked as to where Mrs. Willard was.

Q. Where did you find Mrs. Willard?

A. Found Mrs. Willard under the bed, in the room of Buddy's.

Q. Was any examination made at that time to determine whether or not Mrs. Willard was alive or dead?

A. Yes.

Q. Who made that examination?

A. Mr. Grile and myself.

Q. What was done?

[Tr. 244] A. That was a pulse check, was all.

Q. Just a pulse check?

A. Just a pulse check. We just took ahold of Mrs. Willard's arm.

Q. You did not move the body?

A. No.

Q. Now, will you tell us please—withdraw that question. Mr. Phillips, I'm going to hand you what for purposes of identification has been marked as State's Exhibit 4. Would you look at that please, and see if you can recognize that?

A. I do.

Q. What is it?

A. That is one photograph of the room before anything was disturbed. That's myself and Dr. Kersell.

Q. Is that the room where the body was found?

A. That is the room where the body was found.

Q. Can you tell us from that photograph, where the body was, sir?

A. Under this side of the bed, next to where we're standing, right there.

Q. I see. Are you, in that photograph, near the foot or the head of the bed?

A. I'm near the foot of the bed.

Q. You're near the foot of the bed. Are there any [Tr. 245] windows in that room?

A. There's a window to my left there, on the north side of the house.

Q. Now, I hand you also photographs which are marked for identification as State's Exhibits 1, 2, and 3, and ask you if you'll look at those and identify those please.

A. Number 1 is the body of Mrs. Willard.

Q. Mrs. Gladys Willard?

A. Mrs. Gladys Willard. After the springs and mattress had been removed so the body would not be disturbed.

Q. I see. Is that the body you found there?

A. That is the body we found.

Q. Number 2?

A. Number 2, that is another photograph of Mrs. Gladys Willard as she was found and after the springs and the mattress had been removed.

Q. Number 3?

A. Number 3 is the body of Mrs. Willard after the springs and the mattress had been removed.

Q. Now will you tell us, anything unusual about the body?

A. As to dress?

Q. Yes.

A. Her dress was as is seen at the present time. It was raised up, and the panties and the girdle had been [Tr. 246] pulled down.

Q. Did she have glasses on?

A. No, not at the time.

Q. Where were they?

A. Her glasses were found right beside her body, here, near the head.

Q. Anything else found near the body?

A. The glasses, the lower set of teeth, a hairnet, and her shoes, as seen here.

Q. Now, if you go around the bed in Photograph No.—State's Exhibit No. 4, as you would go around the foot of the bed and over towards the window, which would be the north side of the room, before the bed was torn up or anything, or the bed spread removed, could you by just looking down see the body of Mrs. Willard?

A. No.

Q. You could not?

A. No.

Q. In other words, you would have to have gotten down and looked under to have seen the body?

A. That's right.

Q. Do you know who found the body?

A. My understanding is that Mr. Whittington found the body.

Q. After you found this body and you determined that [Tr. 247] she was dead, what if anything did you do?

A. I prepared to leave to call the Sheriff's Department, to get the coroner and the photographer.

Q. Did they come?

A. Yes.

Q. Who came?

A. Dr. Kersell and Ned Webb, the photographer.

Q. Anyone from the Sheriff's Department?

A. Mr. Berry from the Sheriff's Department.

Q. And what then did you do?

A. Well, they took the photos of the room before anything was disturbed and, after the photos of the room had been taken, Dr. Kersell stated that he didn't believe we could move the bed without disturbing the body; so we removed the mattress and the springs, and Dr. Kersell made his examination.

Q. What then, if anything, was done?

A. How's that?

Q. What, if anything, was done after that?

A. After that, I think, Mr. Berry and I talked to the family some, asked—let's see, we asked Buddy if he had been around home all day, and he stated, "Yes."

Mr. Supman: I'll object, your Honor.

The Court: Objection overruled.

Mr. Supman: Your Honor, in the interest of time, [Tr. 248] may it be stipulated that these are continuing objections as Mr. Kistler mentioned before to anything that Buddy said.

Mr. Morehart: Sure, sure, be glad to.

The Court: Yes, we'll stipulate that.

Mr. Supman: All right. That'll prevent our interrupting the witness.

The Court: And objection overruled.

(Ten Minute Recess to Change Tape)

Mr. Morehart: I think that where we finished on your testimony, where we quit on your testimony was where Dr. Kersell had been there and made his examination, and the pictures had been taken, and the bed removed. Is that right?

A. Yes.

Q. I think then you made some statement that you talked with Mr. and Mrs. Whittington and to Buddy, is that right?

A. That's right.

Q. All right. Now will you tell us when this was and what was said please?

Mr. Supman: Excuse me. Because of the end of the other tape——

The Court: You're making an objection?

Mr. Supman: Only because I was afraid at the end of [Tr. 249] the other tape, that wasn't in the record.

The Court: Yes, we've got the objection.

Mr. Supman: Continued objection without having to repeat them as to anything Buddy Whittington said.

Mr. Morehart: All right.

A. I asked Buddy if he were there all morning, and he said "Yes." And I asked him if he was alone, and he said, "Yes". I asked him if he had seen Mrs. Willard, and Buddy stated yes, she had come to the door about eight o'clock, returned the curlers and left, but he did not know where she went.

Q. By the way, did you see these curlers?

A. Yes, I saw the curlers.

Q. Where were they at the time you saw them?

A. They were in the kitchen.

Q. In the kitchen, and what room is that, in what direction?

A. It's the west room.

Q. The west room, and just for the purpose of the record, here, can you give us the floor plan of the house of Mr. and Mrs. O. A. Whittington?

A. The north half of the house is bedroom and bathroom space.

Q. How many bedrooms?

A. Three.

[Tr. 250] Q. Three bedrooms.

A. Three bedrooms. The rear bedroom, I presume, is Mr. and Mrs. Whittington's. The next bedroom is Buddy's, and then it comes out of Buddy's into a small hall and into the bathroom, and continues on out the hall into the front bedroom.

Q. I see. All right.

A. The kitchen is at the west end of the house.

Q. That would be the southwest?

A. Southwest corner.

Q. All right.

A. The next room, they were using, I presume, as a living room. Of course, there's a large archway between the two, and it could be combined into one; and, of course, the front room would be a combination of the two.

Q. Of the living quarters?

A. Yes.

Q. Did you have any further conversation with Buddy Whittington at that time?

A. Yes. I asked Buddy if he were there all day, and he said he'd been out part of the day hunting Mrs. Willard; and, in fact, he said all day, about all day he had been hunting Mrs. Willard. And I made the statement that we were not called—she was not officially reported missing until three o'clock. Buddy stated he was out long before that and [Tr. 251] mentioned 11:30.

Q. You mean, mentioned 11:30?

A. Mentioned that he had been hunting her.

Q. Since 11:30?

A. Since about 11:30.

Q. All right.

A. At the time, I believe, Mrs. Whittington stated she couldn't understand. Buddy had been—had never been left alone more than one hour at a time until that particular day. Of course, she told us that Buddy was supposed to have gone to school that morning, and he didn't go to school, he stated, because he was sick. And he helped hunt then, and he helped me in the afternoon, I'd say approximately four o'clock, when I ran into the boys.

Q. Did you ascertain what time the Whittingtons had left that morning?

A. From my understanding, it was approximately 7:30.

Q. Who did you get this from? Where did you learn this?

A. I learned it there that day. I'm not going to say any particular person because I don't know. Buddy stated they had left that morning early.

Q. Did he say what he did after they left?

A. Why, Buddy stated he went in and lay down on the bed after they left and turned on his record player.

[Tr. 252] Q. And he told you that he did not go to school because he was ill?

A. Because he was ill.

Q. Do you know what time he was supposed to go to school?

A. He was to be in class at 8:30.

Q. At 8:30. Did you learn from him what time he would usually, normally leave to go to school?

A. No, I didn't ask him what time he would leave to get there.

Q. How far is this from the schoolhouse?

A. About two blocks.

Q. It's close?

A. It's close, real close.

Q. What if anything further did you do in regard to this investigation?

A. I think about that time, you and Mr. Rutherford were there. Of course, I continued my investigation as to trying to find out the details and so forth. But I'm pretty sure that that's about all the questioning, outside of when I came out of the bedroom, Mr. Whittington was standing in the little hallway next to the bedroom. But I've known him for years and years and always called him Bud, and I asked Bud if he knew what might have happened, and Bud stated, "I don't know, unless this boy." Buddy was standing [Tr. 253] right beside him.

Mr. Supman: Unless it's what?

A. Unless this boy.

Mr. Supman: "Unless this boy"?

A. That's right.

Mr. Morehart: Anything further you did Mr. Phillips in regard to this investigation?

A. You mean, this particular night or any time since?

Q. Or any time since, anything further that you did in the way of this investigation.

A. I have talked with neighbors, mostly neighbors, and I've been in to Columbus and checked a few people that had been—In fact, I checked the Willard family, the entire family, Mr. Willard, Jack, Dick, as to where they were and checked their alibis out. I was in Columbus Wednesday and rechecked an alibi on Jack Willard. I was out last night and rechecked an alibi on Herman Willard.

Q. Did you learn where Herman Willard was during the morning hours of July the 29th?

A. I did.

Q. What did you learn?

A. Herman Willard is employed by Adam Poff on a farm about a half mile north of Baltimore. Mr. Poff stated that Mr. Willard was there as usual at six o'clock, which is working time, at his home where he lives. He was there [Tr. 254] until approximately 12:30 of that date. Mr. Poff stated that he sent Herman to Millersport to the farm home of his mother-in-law to check the sweetcorn, to see if it was ready to use and told him to continue on over, back to County Road 46, north of 264, to the home of his father where they worked all afternoon, until he received a call that Mrs. Willard was missing and he came in.

Q. Did you have occasion to check the whereabouts of Jack Willard?

A. I did.

Q. On that morning?

A. I did, yes.

Q. What did your investigation disclose?

A. I made a trip into Columbus, at the employment of Mr. Willard, which is Columbus Army Depot, and I talked with three people in the office of the building where he works. Those people stated that Mr. Willard was on duty that day all day except for maybe a period of twenty minutes when he'd be out into the building, and except for noon hour, until after three o'clock when he received word that his mother was missing. They—or he left there at approximately 3:30 to come home.

Q. I assume, Mr. Phillips, that you have run down a lot of rumors and so forth——

A. I have.

[Tr. 255] Q. —that you have heard and checked those out?

A. Yes, I have.

Q. Have you learned or did you make any effort to determine from the neighbors and so forth whether there were any strange people in the neighborhood up there that day?

A. Yes, I have. I have found nobody in the community who seemed strange at all.

Q. Would you know, Mr. Phillips, in checking the people of the community or any of the neighbors and so forth, did you find anybody who saw Mrs. Willard, Gladys Willard, alive after eight o'clock in the morning?

A. No.

Q. Anybody at all?

A. No.

Mr. Morehart: You may cross examine.

Cross-examination.

By Mr. Kistler:

Q. Mr. Phillips, you say you've known Mr. and Mrs. Whittington for several years?

A. Yes.

Q. What kind of people have you found them to be in the years that you've known them?

A. I've known Bud Whittington for many years, I'll say it that way.

[Tr. 256] The Court: May I ask this. When you speak of Bud Whittington, is that——

A. That's Mr. Whittington.

Mr. Kistler: O. A. Whittington.

The Court: Senior. Sitting at the end. I just don't want to be confused.

A. He's been known as Bud ever since I can remember. I've known him a good many years, and I've found nothing wrong with him whatsoever.

Mr. Kistler: Are they church-going people?

A. They are.

Q. And you've known Buddy as distinguished from the father?

A. I've known Buddy, yes sir.

Q. What is his reputation in the community?

A. I've never had a minute's trouble with Buddy; let's put it that way.

Q. Mr. Phillips, you did investigate this matter after the body was found? Tell us if you learned in your investigation the time that the garbageman was there in the community on this date.

A. Yes, I did.

Q. All right. When was that?

A. Around seven o'clock. It might have been a little before that.

[Tr. 257] Q. Who was the garbageman?

A. Mr. North.

Q. Now, was that on the 29th?

A. That was on the 29th.

Q. The 29th, and did anyone see him leave the vicinity——

A. There were three of them.

Q. —leave the vicinity of the Whittington home and the Willard home?

A. The Willard home, yes. I didn't see them back, or didn't hear about the Whittington home, or, yes that's right, the Whittington home.

Q. Don't you know what time the garbageman came to each of the two homes?

A. I know what time he came to the other homes, yes.

Q. To which one?

A. To the Willard home and on the other street. He came up the alley a short distance.

Q. What time did he come?

A. Approximately seven o'clock.

Q. Did anyone see him come to the Whittington home on this day?

A. I didn't no, or nobody else that I know of did.

Q. Is there an alley back of the Whittington home?

A. There is.

Q. Mr. Phillips, in your investigation did you learn [Tr. 258] that Mrs. Willard had a dog that would follow her wherever she'd go?

A. If it wasn't tied, yes.

Q. On this day in question, did you find the dog?

A. Yes.

Q. Where did you find the dog?

A. I found the dog up along the railroad with the rope chewed.

Q. All right, and did you at any time learn that the dog had been tied over at Bondurants?

A. No, I did not.

Q. No one brought that to your attention?

A. No.

Q. In your investigation, did you determine what time Mr. Willard left the home?

A. Yes.

Q. What time did he leave?

A. 6:50 or 5:50 rather. He was to work at six o'clock.

Q. Did you not also learn from your investigation that he returned back to the vicinity at approximately 8:16 on the 29th?

A. Mr. Willard?

Q. Mr. Willard.

A. No, I did not.

Q. Didn't you learn that his car with him in it was [Tr. 259] seen right there about that time?

A. Now, who have you reference to?

Q. Either at the Whittington home or the Willard home?

A. Who have you reference to?

Q. Mr. Willard.

A. There are two Mr. Willards.

Q. What I mean,—all right, either one of them?

A. No. No.

Q. All right. In your investigation, did you find that on the 29th, or did you learn that Jack Willard was over in the Whittington yard on three different occasions in the morning?

A. No.

Q. Did you learn from your investigation that he picked up something from the Whittington yard on the morning of the 29th?

A. No.

Q. When you went into the Whittington home after being called and told that the body was there, was there anything at all disturbed in the home?

A. Nothing that I seen, no.

Q. Was it your opinion that—strike that. Could it be that Mrs. Willard met her death someplace outside the Whittington home?

[Tr. 260] A. To my knowledge, no.

Q. Would it be possible?

A. Nearly impossible.

Q. Would it be possible though?

A. It could be but how——

Q. Was the body stiff when you first saw it?

A. Yes.

Q. So that it had been there for quite some time?

A. Quite some time.

Q. Do you think the body was placed under the bed?

A. I'm positive it was.

Q. Or do you feel that the body was placed and then the bed put over the body?

A. Well, no. I feel it was put under the bed.

Q. Do you think—from your investigation, where do you think the death occurred?

A. In the Whittington home.

Q. Where in the Whittington home?

A. That I'm not going to say. I don't know. That I don't know.

Q. Some time ago, you made a statement that someone said something that they didn't know how anything happened unless it was the boy. Who made that statement?

A. O. A. Whittington.

Q. The father you mean?

[Tr. 261] A. The father.

Q. Mr. Phillips, did you make an investigation to find out where Mr. and Mrs. Whittington, the parents of the defendant, were during this day?

A. I was told that they had gone to Canton by the neighbors there.

Q. Did you check to determine if they had gone to Canton?

A. Only through the neighbors. I didn't check with Mr. or Mrs. Whittington.

Q. You don't know of your own knowledge whether they went to Canton or not?

A. No. I don't know that it would make me any difference where they were as long as they were gone.

Mr. Kistler: Nothing further.

Mr. Morehart: We may want to recall this witness later.

The Court: All right. You understand, you're not to leave, Mr. Phillips.

Mr. Morehart: Your Honor, before I go any farther here, and before I forget it, I would like to offer into evidence State's Exhibits 1, 2, 3, and 4, which are the photographs, which I think have been properly identified.

Mr. Kistler: We wish to object to the introduction.

[Tr. 262] The Court: What's the basis of the objection?

Mr. Kistler: The photographer testified that when he arrived, others had been there and so that it would be possible that the body and anything shown in there might have been changed from what it was prior to the time these pictures were taken. Furthermore, it shows in the picture, the two bodies, or the feet and part of the limbs of two possible witnesses and in the——

The Court: What's that got to do with it? You mean in one of the pictures, they don't have one end of the body, and in another picture, they have the other end of the body?

Mr. Kistler: No. There's two other men shown in the picture.

The Court: And they have been identified here as being in here and were witnesses, is that right?

Mr. Kistler: We're objecting to the pictures showing these two witnesses who have testified.

The Court: What is the basis of your objection? I think the testimony was that this was the body and it hadn't been moved. That's my recollection of this testimony. That's just the way it was.

Mr. Kistler: He said he couldn't say about that.

The Court: Who said?

Mr. Morehart: Well, of course, he couldn't swear it hadn't been moved before he got there, but he testified [Tr. 263] this was what it was at the time he saw it.

The Court: Well, there might possibly be some other witness here prior to the testimony of—you're referring to whose testimony, Mr. Kistler?

Mr. Kistler: The photographer.

The Court: The photographer. Well, I think the coroner testified as to these pictures and the sameness of the body

and the condition of the bed when he was there, am I right?

Mr. Morehart: So did Mr. Phillips.

The Court: Did Mr. Phillips?

Mr. Morehart: Oh, indeed so.

The Court: I think there's been identity of these.

Motion overruled. They will be accepted into evidence.

WILLIAM RUTHERFORD, being first duly sworn, as provided by law, was examined and testified as follows:

Direct Examination.

By Mr. Morehart:

Q. Will you state your name please?

A. William Rutherford.

Q. Where do you live?

A. Bremen, Ohio.

Q. What is your occupation or profession?

[Tr. 264] A. Probation Officer in the Juvenile Court of Fairfield County.

Q. How long have you been Probation Officer in the Juvenile Court?

A. It will be twelve years in February.

Q. That has been—you've been on this job continuously, I presume?

A. Yes sir.

Q. Did you have occasion to be called to the Village of Baltimore on or about the evening of July 29th of this year?

A. Yes sir, I did.

Q. And do you know who called you?

A. Yes sir. Jerry Hampson, Deputy Sheriff in the Sheriff's Department, called me by phone.

Q. Did you go to Baltimore?

A. Yes sir, I did.

Q. Where did you go?

A. I went to Fremont Street, the home of Mr. and Mrs. Orville Whittington.

Q. Where is that located, in what Village and what County and State?

A. It's in the Village of Baltimore, in Fairfield County, here in the State of Ohio. Fremont Street, to me, is in the western part of the Village. I know it to be [Tr. 265] west of the Liberty Union School. I was instructed to go to the school and go to the second street to my right, and I would see the Sheriff's car sitting there and I would find it. I arrived there and inquired of a man standing on the sidewalk where the Whittingtons lived, and he told me, and I went to the back door.

Q. What did you do then?

A. When I arrived there, I went to the back door and the door, the screendoor, was locked. I knocked on the door, and Deputy Sheriff Berry came to the door and let me in. I found there Mr. and Mrs. Whittington. I was introduced to them; their son Buddy; yourself, Mr. Morehart, was there; Mr. Phillips, the Chief of Police of Baltimore; Mr. Berry, and other gentleman who I was introduced to and, I believe, it was a neighbor or a relative of the family, I'm not sure. I don't remember his name.

Q. What then did you do?

A. Well, at that time, I was told by yourself and by Deputy Berry as to what had happened. I did not know the circumstances, and I was informed by people present that Mrs. Willard, a lady who lived across the street, had been found, that she was dead. That she had been found after she'd been missing most of the day. She'd been found in the bedroom at the Whittington home under the bed.

Q. Did you inspect the bedroom?

[Tr. 266] A. Yes sir, I looked at the bedroom.

Q. You said that you saw Buddy Whittington there. Is he present here in the Courtroom?

A. Yes sir. This is Buddy right there. (witness indicates defendant.)

Q. All right. After you investigated the bedroom and you had talked to the officials present, what then did you do?

A. I talked with Buddy and his parents.

Q. Where did this take place?

A. This took place in the dining room, I would call it, of the Whittington home.

Q. Who was present at the time?

A. Mr. and Mrs. Orville Whittington and their son,

Buddy; Mr. Morehart, the Prosecuting Attorney; the Chief of Police, Mr. Phillips of Baltimore; Mr. Berry, the Deputy Sheriff; and this other gentleman. I don't recall his name.

Q. Do you recall what the conversation was?

A. Yes. The conversation was started out as to where the Whittingtons had been that day, and the conversation was with Mr. Whittington and Mrs. Whittington and the boy. I don't recall whether it was Mr. Whittington or Mrs. Whittington, I believe it was Mr. Whittington, told me that they had gone to Canton to visit some friends or relatives that day and had left in the morning around 7:30 and had [Tr. 267] returned in the evening around the supper hour, sometime—I don't recall exactly what time they returned home, whether they told me or not. In talking with Buddy, he told me he got up that morning and dressed, and was going to go to school; but that after his parents left, he felt ill and he didn't go to school. And I was informed at that time that he attended a summer class at the Liberty Union School, or the Liberty Union High School, taking a course in mathematics, and he didn't go to school because he felt ill.

Q. Did he tell you the nature of his illness?

A. He said he had a stomach-ache.

Q. Any other conversation?

A. Yes. I asked him if he'd seen Mrs. Willard that day, and he told me that he had. That sometime about eight o'clock, she come to the door to return some curlers that his mother had loaned her, or used in fixing Mrs. Willard's hair.

Q. Did he say what door she came to?

A. Said she came to the rear door, and he said he didn't recall just exactly what she said, but she said something like, "You-Who, anybody home?" Something like that. He just didn't recall exactly what it was, but he got up and went to the door. She handed him the curlers and he laid them there on the chair, I believe, or the table. I believe, it was the chair. And she turned and walked away. [Tr. 268] He said he didn't know which way she went, that he went back and lay down on the bed.

Q. Did you have any further conversation with him?

A. Yes. I asked Buddy if he had any idea of how Mrs. Willard's body had got under the bed, and he said he didn't know anything about it. I asked him if he had seen

anybody else around the neighborhood that day, if there had been anybody come to the door, if there was anybody in the house; he said he hadn't seen anybody. I asked him if he'd left the house in the morning, and he said he'd left some time close to noon. He didn't know exactly what time it was. He thought it was sometime right after eleven o'clock, but he wasn't sure. He said he left after a lady came who was a sister of Mrs. Willard and told him that Mrs. Willard was missing. Then, I think, he said he changed his clothes and went to the berry patch to look for Mrs. Willard.

Q. Did he tell you how long he waited there after the woman came to the door before he left?

A. It was some period of time. I don't recall exactly, but it runs in my mind, thirty, forty minutes, something like that. I don't recall. I recall him saying it wasn't right away. He didn't get up and go right away, but he waited and changed clothes and it was a little period of time before he left. But not too awful long. It [Tr. 269] wasn't immediately. He told me, but I just don't recall exactly. But I think he said thirty, forty minutes, something like that.

Q. That's after the woman had been there inquiring?

A. After the lady come and told him. I asked him—he told me he'd gone to look for her, and I asked him how he knew she was missing. And he said this lady had come and told him, asked if she was at the house and asked him if he knew anything about her, that she'd been missing. They couldn't find her. He then said that he went to look for her, and in the afternoon after he'd looked for her, looked in the berry patch, then he came back and went to baseball practice.

Q. Did—In your investigation, did you learn of any strange person or any other person being around the Whittington or Willard home any time during that day?

A. No. sir.

Mr. Morehart: You may cross examine.

Mr. Kistler: No questions if the Court please.

ELWOOD PHILLIPS.

Re-direct examination.

By Mr. Morehart:

Q. You recognize, of course, that you're still under oath?
A. I do.
[Tr. 270] Q. Mr. Phillips, are you acquainted with a man by the name of Richard or Dick Willard?
A. I am.
Q. Where does he live?
A. He lives next door to Mrs. Gladys Willard.
Q. Immediately which direction?
A. North.
Q. Immediately north. What's his wife's name?
A. Lula.
Q. Lula. You've seen his wife here today, I assume?
A. I did.
Q. Testified as a witness. Mr. Phillips, did you have occasion to check out the whereabouts of Richard or Dick Willard——
A. I did.
Q. —on the morning of July 29th?
A. I did.
Q. What did you ascertain?
A. Mr. Willard, Dick Willard, goes to work early in the morning. I think, about seven o'clock and works until 3:30. He gets a half hour for lunch.
Q. Where does he work?
A. Gaylord Container. Paper company, up there. And he quits at 3:30. He was on the job the entire day, according to his boss, Robert Getz. The only time, he was gone [Tr. 271] was to come home, which he has a half hour at noon for lunch, from 11:30 to 12 o'clock.
Q. In other words, in a half hour's time, he has to come home, eat his lunch, and go back?
A. That's right. One-half hour.
Q. He was at work all day?
A. He was at work all day that day, that's right.

Mr. Morehart: That's all. You may cross examine.
Mr. Supman: No questions.

The Court: Now, are you through with this witness?
Mr. Morehart: Yes, I think so.

(Witness excused).

ORVILLE A. WHITTINGTON, being first duly sworn, as provided by law, was examined and testified as follows:

Direct examination.

By Mr. Morehart:

Q. Will you state your name please?
A. Orville Arthur Whittington.
Q. And you live on Fremont in Baltimore, is that correct?
A. 215 Fremont, Baltimore.
Q. And you are the husband of Ollie Whittington——
A. That's right.
[Tr. 272] Q. —and the father of Buddy Whittington, is that correct sir?
A. Yes sir.
Q. And if I'm not mistaken, I think you are retired, is that correct?
A. That's right.
Q. Directing your attention, Mr. Whittington, to the 29th day of July of this year, where were you?
A. We went to Canton to see my sister.
Q. When did you go to Canton? When did you leave?
A. Somewhere around twenty minutes or 7:30.
Q. You mean twenty minutes after seven or 7:30?
A. Yes.
Q. Did anyone go with you?
A. My wife.
Q. Anyone besides your wife?
A. No.
Q. How did you go?
A. I drove my automobile.
Q. What kind of car do you have?
A. A Rambler, a white one.
Q. When you left at—in the morning, was your son, Buddy, up?
A. Yes, he was.

Q. How long had he been up, do you know?

[Tr. 273] A. Just a few minutes, I would say. I just couldn't tell you.

Q. Did you eat breakfast before you left?

A. Yes sir.

Q. Did your son eat breakfast before you left? Did he eat breakfast with you?

A. I don't think he did. I'm not positive, but I don't think he did.

Q. Why was your son up, do you know, before you left?

A. It could have been my wife might have called him to get ready for school.

Q. I see. Your son was in school?

A. Yes.

Q. Where did he go to school?

A. Liberty Union.

Q. What time was he due to go to school? What time did he have to be at school?

A. I think at 8:30, but he usually left about a quarter after.

Q. About a quarter after eight?

A. Yes.

Q. It's not very far from your home to the school, is it?

A. About a couple of blocks maybe.

Q. Had he been going to school regularly?

[Tr. 274] A. Yes sir. He went regularly except for two days, I think, he went to camp. He missed two days.

Q. Was that to a church school of some kind?

A. Yes.

Q. And he was excused for that?

Buddy Whittington: It was 4-H.

A. It was 4-H Camp. He went to 4-H.

Q. Oh, 4-H Camp. Now, Mr. Whittington, was there anyone else in your home when you left besides Buddy?

A. No, there weren't that I know anything about.

Q. I mean to your knowledge.

A. No.

Q. And when did you return?

A. Practically about the same time, about twenty minutes after or 7:30, around there. I don't know just exactly.

Q. Was your wife with you when you returned?

A. Yes sir.

Q. Anyone else?

A. No sir.

Q. Did you see any of the neighbors when you left that morning, Mr. Whittington?

A. I just don't recall seeing any of them, but my wife looked out the back glass, to see if she could see Mrs. Willard in the yard. She's always out about that time in [Tr. 275] the morning.

Q. You know whether she saw her or not?

A. She didn't see her that morning.

Q. She didn't see her that morning?

A. But I saw three garbagemen out front. They went down through there before we left.

Q. "Out front", when you say "out front", what do you mean, sir?

A. They went down the street in front of the house and picked up garbage at the next house down there.

Q. Which house would that be? Who lives there? Barbers?

A. Barbers, yes.

Q. Barbers. That's the house immediately north of yours?

A. Right straight across from the school.

Q. Immediately north of you on your side of the street?

A. Yes.

Q. The garbagemen had gone down through there?

A. That was about, oh I'd say around, seven o'clock. Just a few minutes before we left.

Q. And they went down through there at that time?

A. Yes.

Q. Now, Mr. Whittington, when you returned, what [Tr. 276] did you find, anything unusual there around your house?

A. There were a lot of people out there, and Phillips was there.

Q. Did you learn why they were there?

A. I did later, but I didn't right at the time. I figured the neighbors had been fussing.

Q. What did you learn, the reason for them being there?

A. They said Mrs. Willard was missing.

Q. Whom did you talk to?

A. I just can't rightly tell you. I think maybe my neighbor, Mrs. Mauger, was the first woman I talked to because she came out across the yard as soon as we got home and wanted to know if Mrs. Willard had gone with us that day.

Q. Oh, I see. She was wondering whether or not she'd gone with you?

A. Yes.

Q. Now, Mrs. Mauger lives immediately south of you, does she not?

A. Yes.

Q. On the same side of the street?

A. Yes.

Q. All right. I presume that you told Mrs. Mauger that she had not gone with you?

[Tr. 277] A. I did.

Q. What then did you do?

A. Well, I just don't rightly know, right away.

Q. Did you go in the house?

A. No. I went across the street and talked to some of the neighbors. I went over where they were.

Q. Did your wife go with you?

A. She probably went, but she wasn't right exactly with me.

Q. She didn't go in the house either?

A. No. I went across and I talked to Mr. Phillips, I think, and maybe Mr. Grile. And they were there with Mr. Willard, but I didn't talk to him. I just talked to the two.

Q. Mr. Grile, he's head of the Fire Department up there, isn't he?

A. Yes.

Q. Loy Grile, I believe his name is.

A. Yes.

The Court: I'd like to ask if this return was at 7:20 or 7:30 in the evening or was it at the time right after he left?

Mr. Morehart: No. I think he meant in the evening, did you not?

A. In the evening.

[Tr. 278] The Court: Then I didn't hear it. I just wanted to know.

A. Both times was about the same. Only one was in the morning, and one was in the evening.

The Court: You left in the morning and came back in the evening. Thank you. I just didn't hear that.

Mr. Morehart: When was the first time that you went in the house, Mr. Whittington, when you returned home that evening?

A. Well, I went and looked for the key, and the key wasn't there, or at least I didn't find it. And somebody said Buddy was at ball practice, which I would have known if I had given it a second thought. And I don't know who said it, but I went to the schoolhouse after him. And he had ridden his bicycle up there, and I asked him about the key, if he had it in his pocket, and he said, "No." So, he got on his bicycle and went home, and he got the key; and we unlocked and went in the house.

Q. Where was the key? Was it a different place from where you always keep it?

A. It was—There's a pipe hanger up there where we always put the key. I mean, in this space across there, and there's a little space about four inches, and he stuck it in there between the pipe hanger, which we always kept it over on the other side, or most of the time; and that's [Tr. 279] where I missed it. I just didn't look in that space.

Q. All right. Now when you went in the house, who went in?

A. Well, I think Buddy went in with me, and Brad went in with me, the neighbor boy there.

Q. Who is Brad?

A. That's the Reedy boy, Wayne Reedy's son. They live over on the other corner from us, right back of the Fire Department.

Q. How old is he?

A. He's about, I would say about, fifteen.

Q. And what was he doing there, do you know?

A. He'd been over helping hunt Mrs. Willard.

Q. Oh, I see.

A. We had a lot of stuff in the car, and him and Buddy helped me unload the automobile and we took the stuff all in the house.

Q. Did Mrs. Whittington go in the house with you at that time, also?

A. I don't believe she did. I'm almost positive she didn't right away, but I just don't know when.

Q. All right. After you took this in the house, then what did you do? Did you go back outside?

A. I went back outside.

Q. What did you do after you went back outside?

[Tr. 280] A. I run into Mrs. Mauger out there, and she said, "I searched my house every place." She said, "I went in and looked through my wardrobes", the closets in her house. I said, "Well, I'll go check the garage." You know, our garage is right there back of the house.

Q. Is this garage kept locked?

A. No.

Q. I see.

A. Of course, I went in there and looked, and I went from there in the house. I looked and went back out.

Q. Then what did you do, sir?

A. I fooled around outside awhile, and I got to thinking there could only been one place that I missed looking. So I went back and started looking under the beds.

Q. Did anybody go with you?

A. Yes, Buddy went along.

Q. Buddy went with you?

A. Yes.

Q. How many bedrooms do you have, Mr. Whittington?

A. Three.

Q. Three bedrooms, and where are they in relation to your house?

A. They're on the north side. They're in rotation. We sleep in the one to the west, and Buddy in the middle one, and the other——

[Tr. 281] The Court: May I ask a question. Is your home on the west side of this street?

A. Yes.

The Court: I see. I didn't go up to see this locale. Maybe I should have, but you live on the west side of the street, and the Willards live on the east side.

A. Yes sir.

The Court: And that's this street of Fremont, which runs north and south?

Mr. Morehart: Yes, right, Judge. It intersects Washing-

ton Street. Washington Street is the street that runs east and west.

The Court: Don't add too many because I get lost in Carroll.

Mr. Morehart: Well, that's the one that runs pass the schoolhouse, Judge, and Fremont is the one that runs north.

The Court: I've got it. I understand.

Mr. Morehart: Now, how did you check under the beds, will you tell us just what you did? Which bedroom did you start with?

A. I started with our bed.

Q. With your bedroom?

A. Yes. In the beginning, I never expected to find Mrs. Willard in the home like that.

Mr. Morehart: Well, I have no doubt about that, sir.

[Tr. 282] A. The reason I thought of it was because her and her husband had trouble, and Jack's there; and him and his wife have a lot of trouble. And I thought it was more than she could take, and I figured she would rather die in our house than in her own home.

Q. I see. That was what you maybe were thinking, why you would look, make such a thorough search of your house?

A. Yes.

Q. Now, when you went—Was Buddy with you when you checked the bedrooms?

A. Yes.

Q. Or did he check certain bedrooms and you check certain bedrooms?

A. No, he just went down there and looked in; and I looked under the one, and we went to the next one. And he went on over and walked up there to the end of the vanity, and he just stopped there.

Q. He walked up to the end of the vanity and stopped?

A. He was looking at some little model cars he's got there. He's got the whole top of it covered.

Q. Did he help you look under your bedroom, under your bed?

A. No. He didn't look. He just walked through. He goes with me every place I go.

Q. I see, and he was with you when you looked under [Tr. 283] the bed in your bedroom?

A. Yes.

Q. And you found nothing there?

A. No.

Q. You came out then to his bedroom then, which would be the next bedroom, and you say he walked up to the vanity and stops and starts looking at some little cars?

A. Yes.

Q. Now where did you look under this bed at? Where were you when you looked under this bed?

A. Just about middle-ways.

Q. On which side?

A. It would have been on the south side.

Q. On the south side; that's as you come into the bedroom, is it not?

A. Yes.

Q. Did you get down on your hands and knees?

A. Yes, I got down on my knees and pulled the spread up and——

Q. Were you able to see her at that time?

A. Yes sir.

Q. What did you say?

A. I just don't remember.

Q. What then did you do, right then?

A. I got up and went outside and called my wife, told [Tr. 284] her.

Q. Did you say anything to Buddy?

A. Yes, I said to him, I said something like, "Here she is under your bed."

Q. What did he say.

A. I just can't recall exactly what he said. He says, "Oh, no." or "Can't be" or something similar to that. And he knelt down and looked.

Q. Down beside you? Were you still bent down?

A. No. I had—he was standing over at the end of the bed, and I was still down at the side.

Q. Now did your wife come in then?

A. No. I went outside.

Q. You went outside?

A. Yes sir.

Q. And you called to her and you told her what you had found, I presume. Did Buddy go outside with you?

A. Well, I'm positive he did.

Q. What then did you do when you went outside? Did you tell your wife where other people could not hear or where they could?

A. Well, there were people around, I think. I just don't know how close or——

Q. Well what—Do you recall what you said to her?

A. I just hollered "Mom" at her a couple of times, and [Tr. 285] she came over, and I told her that I'd found her.

Q. Who else did you tell or what did you do?

A. I didn't do anything. Somebody else went and put the calls in, or whatever was did.

Q. I see. Did you go back in the house then?

A. Yes, I went back in with Phillips.

Q. Did you wait outside until Mr. Phillips came, is that what you did?

A. I just don't recall whether Phillips was right there at that time or not. Grile was there. He went in with me.

The Court: Who was that?

A. Grile.

Mr. Morehart: Loy Grile, the head of the Fire Department.

A. Yes, he's head of the Fire Department. He went in with me, and him and I were in there, but I don't recall just when Phillips did come in. It seems to me like he had went home for lunch, and they called him back.

Mr. Morehart: Do you know whether anyone else was at your house that day?

A. Not that I would know anything about.

Q. What is the size of this bedroom, do you know, sir?

A. I think it's 11 by 12.

Q. 11 by 12?

[Tr. 286] A. Yes sir.

Q. And what kind of a bed is there in there? Is it a single bed or a double bed?

A. It's full size bed.

Q. A full size bed, and what is normally under the bed, do you know?

A. Everything that a boy owns.

Q. In other words, he kept a lot of his playthings, toys and so forth, under the bed?

A. He had a little racetrack with these little cars. He keeps that under there all the time. Sometimes his ball glove or cap maybe, or there could be a dozen things under there.

Q. What articles of furniture are in the room besides the bed, Mr. Whittington?

A. There's the chest of drawers and the vanity.

Q. Now, where is the chest of drawers located?

A. It's at the foot of the bed.

Q. At the foot of the bed, all right.

A. And the vanity's over at the corner. It's on the north side.

Q. I see.

A. He has a little stand in front of the window, and he has a nightstand at the head of the bed.

Q. On which side? The nightstand, on which side?

[Tr. 287] A. It's on the north.

Q. North, I see.

A. The northwest corner of the bed.

Q. How many windows are there in this room?

A. One.

Q. One window. This is a ground level room, is that correct?

A. No, the back side is a little bit high.

Q. Well, I mean, it's on the first floor?

A. Yes.

The Court: May I ask this question. Is this a one-floor plan house?

A. No.

The Court: Well, you're talking about all the dining room and kitchen, and bedrooms. Is that all on one floor?

A. Yes, it's all on one floor, but we have an attic, a junk room above.

The Court: I see, that sort of gives me a picture.

Mr. Morehart: I think, you only use the ground floor for living, do you not, sir?

A. Yes.

Q. How many entrances are there to this house?

A. To the house?

Mr. Morehart: Yes.

[Tr. 288] A. Two. One door at the front and one at the back.

Q. Which door do you normally use?

A. The back door.

Q. The back door?

A. The back door is normally used.

Q. Do you keep the front door locked?

A. Most of the time it's locked.

Q. Do you know whether it was open that morning before you left, the front door?

A. That I couldn't say.

Q. Do you remember it being open?

A. No, I don't. I don't think I was out myself that morning. We have the door open, but we have the screen locked, the screendoor.

Q. You have a storm door on it?

A. Yes sir.

Q. And you keep that locked, is that right?

A. Yes.

Q. When you come in the back door, do you come directly into the house or onto a porch?

A. You come in onto a porch and into the kitchen.

Q. Is there a lock on that screendoor?

A. Yes, yes.

Q. Is it a storm door also?

A. Yes, but you just latch it from the inside.

[Tr. 289] Q. You latch it from the inside and that locks it?

A. We have a key for the other door.

Q. And then you have a key for the door that comes into the kitchen, is that right?

A. Yes, but there's no lock on the screendoor only when we're inside, the latch on it. But we have a key for the other door and the screendoor is not locked when we go away.

Q. No, it wouldn't be because you can only lock it from the inside.

A. We lock the other door.

Q. You lock the other door when you go away?

A. Yes.

Q. Let me ask you this. As you come in through the rear entrance-way, not the screendoor, but you're in on the porch and you're coming into the kitchen; as you come to

the kitchen then, do you turn immediately to your left to go into your bedroom?

A. Yes sir.

Q. Just as you come in the door, if you want to go into your bedroom from that way, you turn immediately left, is that right?

A. Yes sir. The door to the right goes to the basement.

Q. And the door to the right to the basement?

[Tr. 290] A. Yes.

Q. Mr. Whittington, when you found this body, do you recall approximately what time it was when you found her under this bed?

A. I couldn't tell you within—I don't believe I could tell you within a half an hour.

Q. Was it dark outside?

A. Sir?

Q. Was it dark outside?

A. No. It wasn't dark outside.

Q. Was it dusk?

A. Yes.

Q. I mean, would you need lights to see outside?

A. No. And you didn't need lights to see inside.

Mr. Morehart: Beg pardon.

A. You could see through the house. You didn't need lights inside.

Q. Did you turn on any lights when you went into the room, do you recall?

A. I just don't even remember whether I did or I didn't.

Q. I see. Mr. Whittington, to your knowledge, did anyone move this body from the time you saw it under the bed until after Mr. Phillips came and Mr. Grile? Did anyone move the body to your knowledge?

[Tr. 291] A. That I wouldn't know because when they handed me the covers and things off the bed, I left. I didn't stay any longer.

Q. No, I mean, before they came. Up until they came, from the time you found the body up to the time they came, to your knowledge, did anyone move the body?

A. No, I'm positive of that.

Q. You didn't move the body?

A. No sir. I never touched it.

Q. You never touched it? Was there anything in disarray in the boy's room, to your knowledge?

A. There was nothing no place that I ever could find.

Q. That was out of place or upset or turned over, anything like that?

A. Not one thing that I ever saw any place.

Q. Did you observe Mr. Whittington, when you first looked into the room, and I think that this was on the first occasion that you went through the rooms and looked for her, isn't that true?

A. Yes.

Q. A few minutes earlier you had gone through the house looking in closets, I suppose, and so forth. Did you look in the bedroom at that time?

A. No, I didn't.

Q. You didn't look in the bedroom?

[Tr. 292] A. I looked in the bedroom, but I didn't look under the bed.

Q. But you didn't look under the bed, no. But did you observe whether or not the bed was made when you were there? When you were looking through the room, did you observe whether or not the bed was made, do you recall?

A. I'm sure it was. I couldn't say how much or anything, but it wasn't messed up or anything like that. I mean, to any certain extent or anything, not noticeable.

Q. Nothing that would attract your attention?

A. No sir.

Mr. Morehart: I think that's all.

Cross-examination.

By Mr. Supman:

Q. Mr. Whittington, do you and Mrs. Whittington own this home?

A. Yes sir.

Q. And the contents?

A. Yes sir.

Q. Have you ever had any trouble with Buddy?

A. Not one day.

Q. Ever been in any trouble?

A. No sir.

Q. Any problems in particular in school?

A. Well, he's a little slow in school, but we never [Tr. 293] had any trouble with him or anything like that.

Q. Had he always passed?

A. Sir?

Q. Had he always passed in his grades?

A. Yes sir.

Q. And he was taking a math course I believe this summer, is that right, sir?

A. Yes, he was a little bit behind.

Q. You heard the—last week when there was a hearing here, witnesses testifying about his attending church and Sunday School and Youth Fellowship regularly, is that right?

A. Yes sir.

Q. About what percent of the time did he attend church?

A. He, I think, he went maybe a couple of years that he never missed, had perfect attendance.

Q. In the last year or two?

A. Maybe three times in the last two years.

Q. Did you ever have any trouble with him staying out late at night?

A. If he was out any later than nine o'clock, I'd remind him.

Q. Did you have any difficulty in that regard?

A. No sir. We always know where he was.

Q. You've said Buddy has never been in trouble. Is [Tr. 294] there anyone else in the neighborhood who has ever been convicted of a serious offense?

Mr. Morehart: Your Honor, I think I will have to object to this unless there's some connection here.

The Court: Objection sustained.

Mr. Supman: I would like to proffer into the record, that if permitted to answer, that the witness would be able to answer and he would answer that there's at least one or two other persons in the immediate neighborhood who has been convicted of an offense as serious as felony.

Mr. Supman: The key, Mr. Whittington——

The Court: Let me ask you if the proffered evidence would name those people?

Mr. Supman: One of which is Larry Bondurant.

Mr. Supman: The key that you found, where was this

with reference to the building? Was it inside or outside the building?

A. Where we kept the key?

Q. Yes, when you came home that evening.

A. Up in the corner of the patio.

Q. Was this outside?

A. Yes sir. It's underneath where the piece goes across. We just lay it up there in the corner.

Q. Is this, the location of this key, something that can be seen by other parties?

[Tr. 295] A. Yes. If you were tall, or I mean taller than I am. I can stand back a-ways and see the key.

Q. Could the placing or removing of this key, could that be seen by other people?

A. Yes.

Q. When Buddy was accompanying you through the house and looking when you were looking under the beds, how did he appear to you?

A. He was about as much surprised as I was, I think.

Q. Prior to the finding of the body, how did he appear to you?

A. He was shocked about it. I could tell.

Q. That was after you found it, but beforehand, was his appearance out of order?

A. No, he was just as normal as he could be, to my knowledge.

Q. Now, you stated that Mr. and Mrs. Willard, that's Gladys Willard, the deceased, and Mr. Willard had been having trouble? How did you know of this?

A. We can hear them.

Q. You can hear them?

A. Yes sir. On an average of twice a week.

Q. Where would you be when you'd be knowing about this trouble?

Q. You can hear it from most any room in the house, [Tr. 296] from the bathroom, from the front, or most anywhere.

Q. Where would they be at the time of this noise?

A. They would be outside. He would be coming outside. He keeps his car down in the street, and lots of times she would follow him clear down to the corner.

Q. What time of morning or evening would this occur as you saw it?

A. It would be in the morning when he was going to work.

Q. Over what period of time have you been observing or hearing this difficulty?

A. It's been going on for, I would say, two years, off and on.

Q. Do you know if the deceased had ever threatened to leave her husband?

A. I heard that, but I don't know anything about it.

Q. Do you know on the day in question, the 29th of July, if Buddy left the house that morning?

A. Only what he said.

Q. And what did he say with reference to that?

A. He said he was over at Kerns', that's over on the other corner. That would be three lots down. He goes back in the alley and goes up. It's the second house, would be the third one, there's an empty lot right there. It's the second house up on the corner.

[Tr. 297] Q. When did he tell you he left the house that morning, does he know? Do you know?

A. No. He didn't state no specific time he left, but he was there; and he was back in the backyard with his B-B gun, he said, at the berry patch.

Q. Now with reference to the Kerns' property and in that berry patch, could the back door of your house be seen from either these two locations?

A. No.

Q. What is the obstruction?

A. The garage sits there, and there's a pine tree at the corner of the garage. And that's all you can see, just up the side and straight to the back.

Q. So that there would be a period of time then when the back door would not be in view of Buddy during that morning according to what he told you?

A. Yes sir.

Q. Do you have a cistern on your back porch?

A. Yes, on the back porch.

Q. How large is that cistern?

A. Oh, about 6 to 8 by 6, I imagine. It's square.

Q. Is there anything in that cistern?

A. No.

Q. Is there an opening to that cistern?

A. Yes, on the porch.

[Tr. 298] Q. Can that be opened and closed at will?

A. Yes. I even looked in there myself.

Q. Do you recall a conversation with Mr. Phillips in which you may have been asked as to what you may know or how this may have occurred, do you remember that conversation?

A. No, I don't. I think a lot of things went on that I just can't recall because——

Q. At any time to your knowledge, did you ever—Did Mr. Phillips or anybody else ever accuse Buddy of this offense?

A. Well, this other guy—what's his name?

Mr. Supman: Rutherford?

A. Rutherford. I would say he accused him at one time.

Q. Did you ever accuse your son?

A. No. I did ask him maybe one time if he'd done that or if he knew anything about it, and he said, "No." Which I think that was my duty.

Q. He has maintained that position with you?

A. Yes sir.

Mr. Supman: No further questions.

Mr. Morehart: I think that's all.

(Witness excused).

[Tr. 299] The Court: You're through? That's your case?

Mr. Morehart: Yes. We had subpoened Mrs. Whittington, but we've decided not to call her. We will rest.

Mr. Kistler: At this time, we do wish on behalf of the defendant to move for a dismissal of the complaint.

The Court: On what basis?

Mr. Kistler: On the basis, if the Court please, that the charge is delinquency, and that delinquency has not been proven. The definition of delinquency is as follows, "A delinquent child includes any child, One, who violates any law of Ohio, or the United States, or any ordinance or regulation of a subdivision of Ohio, except as provided in regard to juvenile traffic offenders. B, who does not subject himself to reasonable control of his parents, teachers, guardian, or custodian by reason of being wayward or

habitually disobedient. C, who is habitually truant from home or school. D, who so deports himself as to injure, endanger the morals or health of himself or others, or, E, who attempts to enter the marriage relation in any state without the consent [Tr. 300] of his parents, custodian, legal guardian, or other legal authority." If the Court please, certainly it cannot be contended by anyone that he attempted to enter the marriage relation or——

The Court: Well, let's not be facetious. This has nothing to do with the marriage relation. Let's get to the point.

Mr. Kistler: I'm sorry.

The Court: There's been a charge that this boy killed this lady, that's the delinquency that's alleged, that he's charged with. Now, we've had the hearing, and now what's your Motion for to that?

Mr. Kistler: As I started to say, there would be only one possible delinquency question here and that would be whether or not he violated any law of Ohio or the United States or any ordinance or regulation of a subdivision of Ohio. There's no evidence in this world to connect this boy with this body that was found in this home, the property owned by Mr. and Mrs. Whittington. The law clothes a defendant with a presumption of innocence, and here there is no evidence, no one, no evidence in any way, to say, to connect this boy with the death of this lady. [Tr. 301] On the other hand, there is evidence, a lot of evidence, that the boy and the lady got along well together, were good friends and had been for many years. The evidence, however, is that there was quarreling continuously between this man and his wife, or at least a lot of quarreling that was heard. The husband in this case testified and answered twice that he came back in the locality of his home at 8:16 a.m. on the morning on this day in question. The testimony furthermore was that he knew that the Whittingtons were gone from the home. Now in this case, the testimony was that the boy was gone. He was in the blackberry patch, and you can't see the back door from the blackberry patch. And that he was over visiting at the neighbors in the morning and from there, you can't see the back door. That he was gone out searching along with Boy Scouts and different ones. The testimony was further that he was playing ball with the team in the afternoon. Testimony was that

anyone could have seen the key to the door to the home at any time from where it was placed. It would have—To connect this boy in any way with this whole matter is just unthinkable. The testimony was that Mrs. Whittington did the [Tr. 302] hair of the decedent the night before and that this morning, the boy heard, the defendant heard, a knocking at the door and that she returned some curlers. And he said, "Thank you", and she walked away, and that's the last he ever saw her until in the evening when the body was found.

The Court: Do you have anything to say Mr. Morehart at this time?

Mr. Morehart: Your Honor, I think the evidence is sufficiently clear. I realize that it is circumstantial, but sometimes circumstantial evidence is the strongest evidence really. It won't lie, your Honor. I don't think that I need to say any more to take up the Court's time. It's late.

The Court: All right. The Court is going to retire with his stenographers here for—Is there any reason why you cannot wait until I can return a verdict about this matter?

Mr. Morehart: Your Honor, I think they want a ruling on the Motion first.

The Court: The ruling is going to be reserved until I retire and check with my stenographers on some testimony given.

Mr. Supman: Your Honor, we would like [Tr. 303] to make a stipulation here. Let the record show that by agreement of the parties that——

The Court: The stipulation of counsel for the defendant

Mr. Supman: And by the stipulation of counsel, that there will be no evidence presented by the defendant until the Court has ruled on the Motion to Dismiss. Of course, then if the Motion is sustained, there would have been no need for any evidence; that, if the Motion is overruled, that then, in the interest of time, the evidence of the defendant would consist, and by stipulation of counsel, it would be the same witnesses who testified, which were approximately seven or eight in number, at the last Motion. And that it is stipulated that their testimony will then be considered as having been testified to today as part of this hearing.

The Court: And the Court will so consider it.
Mr. Morehart: I'll agree to that stipulation.

(Ten Minute Recess).

The Court: All right. The Court [Tr. 304] overrules the Motion to Dismiss. And the Court will then consider the evidence that you presented the other day and has considered it.

Mr. Kistler: Your Honor, may we then make at this point, renew our Motion for the Dismissal of the Complaint.

The Court: That's overruled. What's the basis of that?

Mr. Kistler: If the Court please, now in addition to what was stated before that there was no evidence to establish that the defendant had violated any law of the State or United States or anything else. We have here a young man whose reputation is beyond question, a young man who is known in the community to be law abiding, a young man who has never been involved in any difficulty in any way, a young man who, the neighbors who know him best, cannot believe that he was in any way involved in anything in connection with this. We have the testimony of the minister who has known him and known him to be a boy who attended the church, the church activities. We have the testimony of the school teacher who has known him to be a fine young man, and we have the testimony of the neighbors who [Tr. 305] knew him quite well, who all said there's no risk in any way in connection with anything that this boy might do. He'd be welcome in our home. He's that type of a young man. Now, in view of the evidence that there is no, certainly no evidence of any kind to establish that he violated any law; and, in view of the fact of the type of young man that he is, there's every reason to dismiss this Complaint that has been filed.

The Court: Now the Court finds— That's overruled. The Court finds that there has been a crime committed here, that there has been a homicide committed on this alleged victim; and the Court finds that there is probable cause to believe that this young defendant may have done this act, which, if done by an adult, would be a felony. And, at this time, it is the order of the Court that the boy be examined, physical and mental examination be made of such child, by the Bureau of Juvenile Research, which, I think, is now called the Diagnostic Center of the Youth

Commission. And is Mr. Rutherford here? Would you call him please?

(Mr. Rutherford summoned by bailiff)

[Tr. 306] The Court: Mr. Rutherford, in furtherance of the finding of the Court which has just now ordered that a physical and medical examination be made by the Diagnostic Center of the Youth Commission, it is the further order of the Court that—the law requires, after full investigation, the Court ask you to make any further investigation that hasn't already been disclosed in here with regard to this young man and you'll report to the Court.

Mr. Rutherford: Your Honor, do I understand that he is to go to the Diagnostic Center?

The Court: That's right.

Mr. Rutherford: In so doing that, they request, in times past, that a social history accompany him on a temporary commitment there. And having not dealt with this family before, I wonder if it would be possible for me to talk with them.

The Court: Will counsel for the family have them cooperate with Mr. Rutherford so that can be sent along with the young man for their benefit?

Mr. Supman: Yes sir. And your Honor, may I add, one thing in furtherance of this. In order that he will not be unduly delayed in the incarceration in which he is being held and in light of the fact that Mr. Morehart is going to be going on vacation, could we draw this entry tomorrow morning before Mr. Morehart leaves so that he can be sent up to the Diagnostic Center that much sooner?

The Court: I'm happy to have it done at the earliest moment.

Mr. Supman: Could we have the secretaries type up the entry?

Mr. Morehart: This evening?

Mr. Supman: Yes, this evening.

Mr. Morehart: Well, I'll be here tomorrow.

Mr. Supman: But the Judge won't be here tomorrow; but, of course, he could sign it on Tuesday.

The Court: Well, I could be——

Mr. Morehart: They wouldn't take him until tomorrow anyway.

Mr. Supman: You'll have this for us tomorrow morning?

Mr. Morehart: I'll try to have the [Tr. 308] Entry for you tomorrow morning.

Mr. Supman: If you don't, will you remain in town until this is taken care of?

Mr. Morehart: Oh, definitely. Definitely.

Mr. Supman: And, Mr. Morehart, I assume the Entry will recite the wording of the Judge that he has probable cause to believe that the defendant committed this offense?

Mr. Morehart: Well, it's the Judge's Entry.

The Court: Whatever the Entry is. I think we've followed it in prior circumstances.

Mr. Rutherford: What time would counsel like to have Mr. and Mrs. Whittington come in to see us?

Mr. Supman: Any time.

Mr. Rutherford: Will you want to be there?

Mr. Supman: No.

The Court: Now you say, "any time", what——

Mr. Supman: No, I won't need to be present. You can talk with Mr. and Mrs. Whittington, probably they'd like to wait maybe [Tr. 309-313] until about Tuesday to try and get over this, Bill.

You co-operate with Mr. Rutherford, you understand, Mr. and Mrs. Whittington? If there's any difficulty, you let me know, Bill. I'm sure there won't be.

(Court Adjourned)

[Tr. 314] CERTIFICATE

COUNTY OF FAIRFIELD,
State of Ohio, ss:

I, Diana Jean Williard, Official Court Reporter for the Juvenile Court of Fairfield County, Ohio, duly appointed and qualified, do hereby certify that the foregoing is a true and complete transcript of all the proceedings, including all Exhibits and other evidence, had in Case No. 6183-J, in the Matter of Buddy Lynn Whittington, an Alleged Delinquent Child, in the Juvenile Court of Fairfield County, Ohio, on August 25, 1966, and on September 2, 1966.

Diana Jean Williard, Official Court Reporter.

TRANSCRIPT OF DOCKET AND JOURNAL ENTRIES

TO SUPREME COURT OF THE UNITED STATES OF AMERICA

Revised Code, Sec. 2505.08.09

COURT OF APPEALS OF FAIRFIELD COUNTY, OHIO

No. 421

IN THE MATTER OF

BUDDY LYNN WHITTINGTON, AN ALLEGED DELINQUENT CHILD

1966,	Sep. 12,	Notice of Appeal. C.B. 2, P. 166.
"	, Sep. 14,	Motion. C.B. 2, P. 166-167.
"	, Sep. 14,	Original Motion mailed to Judge Rutherford this date.
"	, Sep. 19,	Motion for Suspension of Execution of Sentence Pending Appeal. C.B. 2, P. 167.
"	, Sep. 20,	Motion. C.B. 2, P. 168.
"	, Sep. 20,	Transcript of Docket and Journal Entries and forty-three (43) papers from Juvenile Court, Lancaster, Ohio, Fair-Fairfield County.
"	, Sep. 20,	Memorandum in Opposition to Motion to Dismiss Appeal.
"	, Sep. 21,	Entry. Jr. 2, P. 136.
"	, Sep. 30,	Memo. Jr. 2, P. 136.
"	, Oct. 4,	Judgment Entry. Jr. 2, P. 137.
"	, Oct. 31,	Bill of Exceptions.
"	, Nov. 8,	Brief of Defendant-Appellant (Statement of the Case. C.B. 2, P. 172 to 175)
"	, Nov. 8,	Assignment of Errors. C.B. 2, P. 175-176.
"	, Nov. 14,	Motion for Order Fixing Appeal Bond. C.B. 2, P. 177.
"	, Nov. 16,	Journal Entry. Jr. 2, P. 138.
"	, Nov. 16,	Appeal Bond Filed and Approved. Ap. Bk. 2, P. 103.
"	, Nov. 23,	Appellee's Answer Brief.
"	, Nov. 29,	Appellant's Reply Brief.
"	, Nov. 29,	Application for Permission to File an Amicus Curiae Brief. C.B. 2, P. 177.
"	, Nov. 29,	Memorandum.
"	, Dec. 20,	Motion. C.B. 2, P. 178-179.

"	, Dec. 21,	Motion. C.B. 2, P. 179.
"	, Dec. 21,	Entry. Jr. 2, P. 148.
"	, Dec. 21,	Entry. Jr. 2, P. 148.
"	, Dec. 22,	Memorandum.
"	, Dec. 22,	Journal Entry. Jr. 2, P. 151.
"	, Dec. 23,	Precipe. C.B. 2, P. 179.
"	, Dec. 23,	Order to Serve issued to the Sheriff of Fairfield County.
"	, Dec. 23,	Order to Serve Returned Endorsed. December 23, 1966, I served the within named Robert U. Hastings Juvenile Judge of Fairfield County, Ohio personally with the certified copy of Journal Entry filed December 22nd., 1966, at 4:03 o'clock P.M. herewith, as by this order I am commanded. Jack Blazer, Sheriff By Margaret M. Olive, Deputy (Served by B. Andrus)
1967, Jan.	3,	Memorandum. Jr. 2, P. 152 to 160.
"	, Jan. 16,	Notice of Appeal. C.B. 2, P. 180.
"	, Jan. 16,	Entry. Jr. 2, P. 162.
"	, Jan. 24,	Entry. Jr. 2, P. 164-165.
1967, Mar.	23,	Precipe. C.B. 2, P. 188-189.

COURT OF APPEALS OF FAIRFIELD COUNTY, OHIO

No. 421

IN THE MATTER OF
BUDDY LYNN WHITTINGTON, AN ALLEGED DELINQUENT CHILD

NOTICE OF APPEAL

Buddy Lynn Whittington, a minor 14 years of age, defendant-appellant, gives Notice of his Appeal to the Court of Appeals of Fairfield County Ohio, from the order and final judgment made and entered herein in the above entitled cause on the 7th day of September, 1966 whereby the Court found the defendant to be a delinquent child as set forth in the complaint. Said Appeal is on questions of law.

Jack Supman, Judson C. Kistler,
Attorneys for Defendant-Appellant, Buddy Lynn Whittington, a minor 14 years of age

Copy mailed to E. Raymond Morehart, Prosecuting Attorney for Plaintiff-Appellee, this 12th day of September, 1966.

Jack Supman, Judson C. Kistler,
Attorneys for Defendant-Appellant, Buddy Lynn Whittington, a minor 14 years of age

IN THE COURT OF APPEALS, FIFTH APPELLATE DISTRICT,
FAIRFIELD COUNTY, OHIO

No. 421

IN THE MATTER OF

BUDDY LYNN WHITTINGTON, AN ALLEGED DELINQUENT CHILD

MOTION

Now comes the defendant, Buddy Lynn Whittington, a minor 14 years of age, he having reached the age of 14 years on July 23rd, 1966 and moves the Court that he be released to the custody of his parents pending the appeal herein or be released on bond in an amount fixed by the Court.

In this said cause the defendant was confined on August 5th, 1966 in solitary confinement in an antiquated iron cell and cage where he has been confined until September 12th, 1966 at approximately 1:00 o'clock P.M. when he was committed to the Juvenile Diagnostic Center of the Ohio Youth Commission for a complete mental and physical examination.

That on the 24th day of August, 1966 the defendant, Buddy Lynn Whittington, filed a written Motion in the Juvenile Court praying and begging that he be admitted to bond in a reasonable amount as fixed by the Court or that he be released to the custody of his parents or that he be sent to the Franklin County Detention Home and at that time a large number of witnesses including a minister, a Sunday School Superintendent, a school teacher, neighbors, and others testified that there was absolutely no risk in this boy being admitted to bond or released to his parents, that his parents are fine Christian people and the home of the parents is a fine Christian home, that the father was retired and could spend all of his time with his son and several witnesses testified they would welcome the boy in their home at any time and if for any reason the Court did not wish to send the boy to the parents home, they would gladly take him into their home. That the boy and his parents have never been involved in any trouble of any kind and were always peaceful and law abiding, regular

attendants at church and Sunday School and the Police Chief at the trial of this case said that the boy had never been involved in any trouble or words to that effect and the witnesses indicated and testified that they couldn't believe that he was involved in any way in the death of the decedent.

No evidence was offered by the State of Ohio to indicate that the boy should not be released on bond or to his parents, who are admittedly fine Christian people, but the Court did deny the Motion and did continue the defendant in said solitary confinement in an iron cell from the 5th day of August, 1966 to the said 12th day of September, 1966 when he was sent to the Diagnostic Center as hereinbefore set forth.

That there is no reason whatsoever why this defendant who has just reached 14 years of age, who has a good reputation, who is peaceful and law abiding and who would not constitute a risk in any way while this matter is pending on appeal, should be ordered confined until this matter is adjudicated by this Court.

Therefore, the defendant respectfully requests the Court that he be immediately ordered released to the custody of his parents pending the appeal or that he be admitted to bond in a reasonable amount to be fixed by this Court.

Jack Supman, Jordan C. Kistler,
Attorneys for Defendant, Buddy Lynn Whittington, a minor 14 years of age.

Copy mailed to E. Raymond Morehart, Prosecuting Attorney, Fairfield County, Ohio, this 14th day of September, 1966.

Jack Supman, Jordan C. Kistler,
Attorneys for Defendant, Buddy Lynn Whittington, a minor 14 years of age.

IN THE COURT OF APPEALS, FIFTH APPELLATE DISTRICT,
FAIRFIELD COUNTY, OHIO

Case No. 421

IN THE MATTER OF

BUDDY LYNN WHITTINGTON, AN ALLEGED DELINQUENT CHILD

MOTION

Now comes E. Raymond Morehart, Prosecuting Attorney of Fairfield County, Ohio, and moves the Court to dismiss the Appeal filed by the defendant-appellant, Buddy Lynn Whittington, for the reason that the order appealed from is not a final order and is therefore not subject to appeal, and that the Juvenile Court of this County still has jurisdiction of the above styled cause.

E. Raymond Morehart,
Prosecuting Attorney, Fairfield County, Ohio.

Copy mailed to attorneys for defendant this 19th day of September, 1966.

COURT OF APPEALS, FIFTH DISTRICT, FAIRFIELD COUNTY, OHIO

Case No. 421

Decided Sept. —, 1966.

IN THE MATTER OF

BUDDY LYNN WHITTINGTON, AN ALLEGED DELINQUENT CHILD

Judges: Hon. Leland Rutherford, P.J., Hon. D. Deane McLaughlin, Hon. Paul D. Van Nostran.

MEMO

APPEARANCES:

E. Raymond Morehart, attorney for Plaintiff-Appellee.

Jack Supman and Judson C. Kistler, attorneys for Defendant-Appellant.

By the Court:

The court coming on to hear the motion of the Prosecuting Attorney to dismiss the appeal filed by the defendant-appellant, for the reason that the order appealed from is not a final order, is overruled.

The court further considering the motions of the defendant-appellant, Buddy Lynn Whittington, (1) for suspension of execution of sentence pending the outcome of this appeal; (2) defendant-appellant's motion that defendant-appellant be released in the custody of his parents pending the appeal or be released on bond, are continued pending the return of the report from the Juvenile Diagnostic Center of Ohio to the Juvenile Court of Fairfield County. Entry to be submitted accordingly.

Paul D. Van Nostran, D. Deane McLaughlin,
Judges.

RUTHERFORD, P.J.

I concur in the overruling of the motion to dismiss the appeal, from the finding that Buddy Lynn Whittington is a delinquent child as set forth in the complaint, for want of a final appealable order. See Section 2501.02 Revised Code.

I would at this time overrule rather than continue the motions for stay and for release under bond for the reason that Buddy Lynn Whittington is at present being detained under an order which is only temporary and interlocutory in nature and is authorized under the provisions of Section 2151.26 Revised Code, as specified by the Juvenile Court.

Leland Rutherford, Judge.

IN THE COURT OF APPEALS, FIFTH APPELLATE DISTRICT,
FAIRFIELD COUNTY, OHIO

No. 421

IN THE MATTER OF

BUDDY LYNN WHITTINGTON, AN ALLEGED DELINQUENT CHILD

JUDGMENT ENTRY

This cause came on to be heard on the Motion of the Prosecuting Attorney to dismiss the appeal filed by the defendant-appellant, for the reason that the order appealed from was not a final order and was argued by counsel and submitted to the Court and the Court upon consideration thereof and for good cause shown did overrule said Motion, to all of which the Prosecuting Attorney, Attorney for Plaintiff-Appellee, excepts.

The matter came on further to be heard on the Motions of the defendant-appellant, Buddy Lynn Whittington, for suspension of execution of sentence pending the outcome of this appeal and defendant-appellant's Motion that defendant-appellant be released in the custody of his parents pending the appeal or be released on bond and the same was argued by counsel and submitted to the Court and the Court upon consideration thereof and for good cause shown did continue said Motions pending the return of the report from the Juvenile Diagnostic Center of Ohio, to all of which the defendant-appellant, excepts.

Paul D. Van Nostran, D. Deane McLaughlin, Judges.

Approved by:

E. Raymond Morehart, Attorney for Plaintiff-Appellee.

Jack Supman, Judson C. Kistler, Attorneys for Defendant-Appellant.

COURT OF APPEALS, FIFTH DISTRICT, FAIRFIELD COUNTY, OHIO

No. 421

IN THE MATTER OF

BUDDY LYNN WHITTINGTON, AN ALLEGED DELINQUENT CHILD

JOURNAL ENTRY

Upon application of Buddy Lynn Whittington by his counsel, it is ordered that further proceedings by the Juvenile Court of Fairfield County, upon the finding of Buddy Lynn Whittington to be a delinquent child, be stayed pending final determination by this Court of the appeal from said finding, conditioned upon Buddy Lynn Whittington giving an appeal bond conditioned according to law in the sum of $25.00, provided, however, that said stay and bond shall in no way stay any existing order as to custody of Buddy Lynn Whittington, or stay the right of the Juvenile Court of Fairfield County to determine or make orders regarding the temporary custody of said Buddy Lynn Whittington pending appeal.

It is further ordered that the appeal in this cause is assigned for hearing on the 29th day of November, 1966, at the Court House, Lancaster, Ohio, at 1:30 P.M.

Leland Rutherford, D. Deane McLaughlin, Paul D. Van Nostran, Judges.

IN THE COURT OF APPEALS, FIFTH APPELLATE DISTRICT,
FAIRFIELD COUNTY, OHIO

No. 421

IN THE MATTER OF
BUDDY LYNN WHITTINGTON, AN ALLEGED DELINQUENT CHILD

JOURNAL ENTRY

This 22nd day of December, 1966, this cause came on to be heard upon Motion of the parents and counsel for Buddy Lynn Whittington, age 14, heretofore found by the Juvenile Court to be a delinquent child, for an order releasing said child to the custody of his parents, or that he be released on bond.

The testimony as given on hearing of a like Motion before Juvenile Court and contained in the Bill of Exceptions filed in this cause on appeal from the finding of delinquency was admitted in evidence for the purpose of this hearing and the Court upon agreement of counsel for all parties viewed the premises where Buddy has been confined by the Juvenile Court for a period of 78 days.

From our view, we find that Buddy is confined in a portion of the jail used for adults and that an adult is in fact now confined in an adjoining cell, in the same room.

Section 2151.34, Revised Code of Ohio, provides:

> "No child under eighteen years of age shall be placed in or committed to any prison, jail or lockup, nor shall such child be brought into any police station, vehicle or other place where such child can come in contact or communication with any adult convicted of crime or under arrest and charged with crime; provided that a child fourteen years of age or older may, for good cause shown, and with the consent of the juvenile judge or a person designated by him, be placed in a place of detention for adults, but in a room or ward separate from adults. All children under eighteen years of age when confined in such places of juvenile detention, shall not be detained for a period to exceed ninety days."

Under the conditions which we have found from our observation this day, it is our finding that Buddy Lynn Whittington is not placed in a place which meets the requirement fixed by Section 2151.34, Revised Code of Ohio.

This Motion for an order of this Court releasing Buddy to the custody of his parents or releasing him on bond is ordered overruled, for the reason that said matter of temporary custody is within the jurisdiction of the Juvenile Court. However, it is ordered that this cause is remanded to the Juvenile Court solely for the purpose of that Court making an order for the temporary custody of Buddy Lynn Whittington which is in compliance with the law.

Leland Rutherford, D. Deane McLaughlin, John C. Duffy, Judges. Judge John C. Duffy of the Tenth District, sitting in the Fifth District by designation.

IN THE COURT OF APPEALS, FIFTH DISTRICT,
FAIRFIELD COUNTY, OHIO

Case Number 421

Decided: —.

IN THE MATTER OF

BUDDY LYNN WHITTINGTON, AN ALLEGED DELINQUENT CHILD

Judges: Hon. Leland Rutherford, P.J., Hon. D. Deane McLaughlin, Hon. Paul D. Van Nostran.

MEMORANDUM:

APPEARANCES:

E. Raymond Morehart, Prosecuting Attorney, Fairfield County, Ohio.

S. Farrell Jackson, Assistant Prosecuting Attorney, Fairfield County, Ohio. For Appellee.

Jack Supman and Judson C. Kistler, 124½ West Main Street, Lancaster, Ohio, Attorneys for Appellant.

By the Court:

This is an appeal by Buddy Lynn Whittington from a judgment of the Juvenile Court finding him to be a delinquent child.

On August 5, 1966, a complaint was filed in the Juvenile Court of Fairfield County, Ohio, by Elwood R. Phillips, the pertinent part of which reads:

> "The undersigned says that he has knowledge of Buddy Lynn Whittington, a minor under the age of 18 years, to-wit, the age of 14 years; that said minor appears to be a delinquent child in this: that he did, on or about the 29th day of July, 1966, in the Village of Baltimore, County of Fairfield, State of Ohio, unlawfully, purposely and maliciously kill one Gladys Willard, contrary to Section 2901.05 of the Revised Code of Ohio."

Elwood R. Phillips was the Chief of Police of Baltimore, Ohio.

On August 5, when the complaint was filed, the Judge of the Juvenile Court ordered a warrant to issue to the Probation Officer for the arrest of Buddy Lynn Whittington

and ordering that when arrested he be brought before the Court. He was arrested and brought before the Court on the same day and has from the time of his arrest had representation of counsel.

Since August 5, Buddy has been held in detention by the Juvenile Court, during part of which time he has been at Juvenile Diagnostic Center.

On August 10, a motion was filed requesting that Buddy be released to his parents.

On August 11, a journal entry was filed as follows:

> "This 11th day of August, 1966, came E. Raymond Morehart, Prosecuting Attorney, also came Buddy Lynn Whittington along with his counsel, Jack Supman and Judson Kistler, to be arraigned upon a charge of delinquency. Also present were the parents of said child, Orville A. Whittington and Ollie Mae Whittington. The charge was distinctly read to Buddy Lynn Whittington and he was required to plead thereto.
>
> "Whereupon the said Buddy Lynn Whittington through his counsel entered a plea of 'not guilty' to said charge. It is therefore ordered by the Court that said case be set for hearing on the 24th day of August, 1966 at 9:30 o'clock a.m."

On August 24, hearing was held and testimony taken on the motion of Buddy to be released to his parents, placed on bond, or to be sent to the Franklin County Detention Home while this matter is pending. Said motion was overruled and said cause continued for further hearing on September 2, 1966.

At the hearing on September 2, 1966, in addition to the testimony then taken, it was stipulated that the testimony taken on the motion on August 25 be included and the Bill of Exceptions contains a complete transcript of all the proceedings.

Buddy's parents were normally at home, but on July 29 they left around 7:20 or 7:30 a.m. to visit a relative in Canton, Ohio. Buddy was up at the time, but was left at home alone that he might attend a summer school class in which he was enrolled at Liberty Union School. The class was scheduled at 8:30 a.m.

The Whittington's lived at 215 Fremont Street. The decedent, Mrs. Gladys Willard was a neighbor who lived with her husband, Herman Willard, across the street at 220 Fremont. A son, Jack Willard, also lived in the home with his parents. Jack had been separated from his wife for approximately nine months. They had previously lived two doors from his parents. The record does not disclose the whereabouts of Jack's wife or of his children with whom Buddy had played when Jack's family was together. Dick Willard, also a son of the decedent lived with his wife, Lula, and daughter, Susan, at 226 Fremont, next door to his parents. The decedent's mother, Mrs. Stella Brandon, and a sister, Genevieve Anderson lived at Route 1, Baltimore. Another sister, Aurilla Goodrich, resides in Florida, but in July was visiting at the Brandon home.

Herman, the decedent's husband, worked for Adam Poff, on a farm and left for work at about 6:00 a.m. on July 29.

Jack testified that his mother called him and prepared his breakfast at 6:20, that he left for work at approximately 6:50 and was at work at Defense Construction Supply Center, Columbus, Ohio at 7:45 a.m.

The daughter-in-law, Lula, testified that her husband, Dick, had gone to work at 6:45 a.m.

Elwood R. Phillips testified that he later talked to neighbors; that Mrs. Estep said she saw Mrs. Willard at approximately 6:30 a.m. on July 29 at the rear of her lot, presumably feeding her chickens, at which time she talked to her briefly; that Mrs. Barber stated she saw Mrs. Willard at 7:30 or a quarter of eight in her own yard drawing water from a hydrant presumably for her dog. There was no objection made to this hearsay testimony.

It was blackberry season and Gladys Willard was in the habit of going out mornings to pick blackberries in nearby areas. Her sister, Genevieve Anderson, also often went blackberry picking in the morning. On Friday mornings, it was the custom of Gladys Willard to drive to her sister Genevieve's at about 10:00 a.m. and they would go shopping at Lancaster.

The daughter-in-law, Lula Willard, who lived next door, testified that she went to Mrs. Willard's house at 8:40 a.m. to ask that she bring her girl a pair of pajamas, when she went shopping. No one answered the door, but her car was

there. At ten o'clock Lula tried again but no one answered at Mrs. Willard's home.

At 11:45 a.m. Genevieve called Lula to inquire and Lula sent her daughter to check. She found no one home, but the car was still there.

Shortly thereafter a search was commenced. Numerous people joined in the search, including Buddy Lynn Whittington, neighbors and relatives. Later in the afternoon they were joined by law enforcement officials. Primarily the search covered areas where there were blackberries.

Later in the afternoon, Buddy went to play ball. His parents returned home at approximately 7:30 p.m.

As to what happened at this time, Mr. Whittington testified:

> "Well, I went and looked for the key, and the key wasn't there, or at least I didn't find it. And somebody said Buddy was at ball practice, which I would have known if I had given it a second thought. And I don't know who said it, but I went to the school house after him. And he had ridden his bicycle up there, and I asked him about the key, if he had it in his pocket, and he said, 'No.' So he got on his bicycle and went home; and we unlocked and went in the house.
>
> Q. Where was the key? Was it in a different place from where you always keep it?
>
> A. It was . . . there's a pipe hanger up there where we always put the key. I mean, in this space across there, and there's a little space about four inches, and he stuck it in there between the pipe hanger, which we always keep it over on the other side, or most of the time, and that's where I missed it. I just didn't look in that space."

After testifying that he had taken some things into the house, Mr. Whitting further testified:

> "Q. What did you do after you went back outside?
>
> A. I run into Mrs. Mauger out there, and she said 'I searched my house everyplace.' She said, 'I went in and looked through my wardrobes, the closets in her house.' I said, 'Well, I'll go check the garage. You know our garage is right there back of the house.

Q. Is the garage kept locked?
A. No.
Q. I see.
A. Of course, I went in there and looked, and I went from there in the house. I looked and went back out.
Q. Then what did you do, sir?
A. I fooled around outside awhile, and I got to thinking there could only be one place that I missed looking. So I went back and started looking under the beds.
Q. Did anybody go with you?
A. Yes, Buddy went along.
Q. Buddy went with you?
A. Yes.
Q. How many bedrooms do you have, Mr. Whittington?
A. Three.
Q. Three bedrooms, and where are they in relation to your house?
A. They're on the north side. They're in rotation. We sleep in the one to the west, and Buddy in the middle one, and the other . . .
Q. Now, how did you check under the beds, will you tell us just what you did? Which bedroom did you start with?
A. I started with our bed.
Q. With your bedroom?
A. In the beginning, I never expected to find Mrs. Willard in the home like that. Mr. Morehart: Well, I have no doubt about that, sir.
A. The reason I thought of it, was because her and her husband had trouble, and Jack's there; and him and his wife have a lot of trouble. And I thought it was more than she could take, and I figured she would rather die in our house than in her own home.
Q. I see. That was what you maybe were thinking, why you would look, make such a thorough search of your house?
A. Yes.
Q. Now when you went . . . was Buddy with you when you checked the bedrooms?
A. Yes.
Q. Or did he check certain bedrooms and you check certain bedrooms?

A. No. He just went down there and looked in; and I looked under one and he went to the next one. And he went on over and walked up there to the end of the vanity, and he just stopped there.
Q. He walked up to the end of the vanity and stopped?
A. He was looking at some model cars he's got there. He's got the whole top of it covered.
Q. Did he help you look under your bedroom, under your bed?
A. No. He didn't look. He just walked through. He goes with me every place I go.
Q. I see, and he was with you when you looked under the bed in your bedroom?
A. Yes.
Q. And you found nothing there?
A. No.
Q. You came out then to his bedroom then, which would be the next bedroom, and you say he walked up to the vanity and stops and starts looking at some little cars?
A. Yes.
Q. Now where did you look under his bed at? Where were you when you looked under his bed?
A. Just about middle-ways.
Q. On which side?
A. It would have been on the south side.
Q. On the south side; that's as you come into the bedroom, is it not?
A. Yes.
Q. Did you get down on your hands and knees?
A. Yes, I got down on my hands and knees and pulled the spread up and . . .
Q. Were you able to see her at that time?
A. Yes, sir.
Q. What did you say?
A. I just don't remember.
Q. What did you do then, right then?
A. I got up and went outside and called my wife, told her.
Q. Did you say anything to Buddy?
A. Yes, I said to him, I said something like, 'Here she is under your bed'.
Q. What did he say?

A. I just can't recall exactly what he said. He says, 'Oh, no' or 'can't be' or something similar to that. And he knelt down and looked."

The bedrooms were all on the first floor. The parents bedroom was to the left as one would come in the back door and Buddy's bedroom was next to it. Everything in the house appeared to be in order at the time Mr. Whittington searched the house.

The Sheriff and Coroner were called. There was a general inquiry of those present as to what had happened. Chief of Police Elwood R. Phillips testified that he and Mr. Berry from the Sheriff's Department talked to the family some and asked Buddy if he had been around home all day, and he stated, "Yes". An objection to statements of Buddy was overruled and it was stipulated that continuing objections could be had to testimony as to anything said by Buddy. Mr. Phillips then testified as follows:

"A. I asked Buddy if he were there all morning and he said, 'Yes'. And I asked him if he was alone and he said, 'Yes'. I asked him if he had seen Mrs. Willard, and Buddy stated, 'Yes, she had come to the door about eight o'clock, returned the curlers and left', but he did not know where she went.

Q. By the way, did you see these curlers?

A. Yes, I saw the curlers.

Q. Where were they at the time you saw them?

A. They were in the kitchen. . . . . .

Q. Did you have any further conversation with Buddy at that time?

A. Yes, I asked Buddy if he were there all day, and he said he'd been out part of the day hunting Mrs. Willard; and, in fact, he said all day, about all day he had been hunting Mrs. Willard. And I made the statement that we were not called—she was not officially reported missing until three o'clock. Buddy stated that he was out long before then and mentioned 11:30.

Q. You mean, mentioned 11:30?

A. Mentioned that he had been hunting her.

Q. Since 11:30?

A. Since about 11:30.

Q. All right.
A. At the time, I believe Mrs. Whittington stated she couldn't understand. Buddy had been—had never been left alone more than an hour at a time until that particular day. Of course, she told us that Buddy was supposed to have gone to school that morning, and that he didn't go to school, he stated, because he was sick. And he helped hunt then and he helped me in the afternoon, I'd say approximately four o'clock when he ran into the boys."
No objection was made to the statements of Mrs. Whittington.

"Q. Did Buddy say what he did after they (his parents) left?
A. Why, Buddy stated he went in and lay down after they left and turned on his record player.
Q. And he told you he did not go to school because he was ill?
A. Because he was ill."

Mr. Phillips further testified that he checked out the alibis of Herman Willard, Jack Willard and Dick Willard and all were at work. No objection was made to this testimony. Herman Willard at one point testified he was back home at 8:00 a.m. but later said this testimony was in error, that he sometimes returned home but had done so on the 29th.

Three garbagemen had picked up garbage along the street at about 7:00 a.m.

The decedent's dog was found along the railroad with his rope chewed.

Mr. William Rutherford, Probation Officer for the Juvenile Court testified that on the evening of July 29 he had conversations with Mr. and Mrs. Whittington and Buddy at the Whittington home, a part of which were as follows:

"In talking with Budy he told me got up that morning and dressed, and was going to go to school; but that after his parents left, he felt ill and didn't go to school....

He said he had a stomach ache.

I asked him if he'd seen Mrs. Willard that day, and he told me that he had. That sometime about eight o'clock, she came to the door to return some curlers that his mother had loaned her, or used in fixing Mrs. Willard's hair. . . . Said she came to the rear door . . . he got up and went to the door. She handed him the curlers and he laid them there on the chair, I believe, or on the table. . . . And she turned and walked away. He said he didn't know which way she went, that he went back and lay down on the bed. . . . I asked Buddy if he had any idea of how Mrs. Willard's body got under the bed and he said he didn't know anything about it. I asked him if he had seen anybody else around the neighborhood that day, if there had been anybody come to the door, if there was anybody in the house; he said he hadn't seen anybody.

I asked him if he'd left the house in the morning, and he said he'd left sometime close to noon. He didn't know exactly what time it was. He thought it was sometime right after eleven o'clock but he wasn't sure. He said he left after a lady came who was a sister of Mrs. Willard and told him that Mrs. Willard was missing. Then, I think he said he changed his clothes and went to the berry patch to look for Mrs. Willard."

Orville A. Whittington, the father, testified:

"Q. Do you know on the day in question, the 29th of July, if Buddy left the house that morning?

A. Only what he said.

Q. And what did he say with reference to that?

A. He said he was over at Kerns', that's over on the other corner. That would be three lots down. He goes back in the alley and goes up. It's the second house, would be the third one, there's an empty lot right there. It's the second house up to the corner.

Q. When did he tell you left the house that morning, does he know? Do you know?

A. No. He didn't state no specific time he left, but he was there; and he was back in the back yard with his B-B gun, he said, at the berry patch.

Q. Now with reference to the Kerns' property and in

that berry patch, could the back door of your house be seen from either of these two locations?

A. No.

Q. What are the obstructions?

A. The garage sets there, and there's a pine tree at the corner of the garage. And that's all you can see just up the side and straight to the back.

Q. So that there would be a period of time then when the back door would not be in view of Buddy during that morning according to what he told you?

A. Yes, sir."

Buddy Lynn Whittington did not testify.

There was testimony that the mattress and springs had been removed and the body placed rather than shoved under the bed. Pictures were taken before the body was moved and are in evidence. Decedent's glasses, hair net, shoes, and lower dentures were beside the body under the bed.

Based upon medical examination and autopsy, the medical testimony was that Mrs. Willard's death was homicide by manual strangulation with a soft object, probably by hands or an arm placed around her neck from behind. Her dress was pulled up but medical examination showed no evidence of sexual attack. The doctor who examined the body at about 8:45 p.m. gave his opinion that death had occurred approximately twelve hours earlier, but eleven hours or over, during which time she had been in the same position under the bed as when the body was found. There were some broken ribs.

There was an abundance of evidence as to Buddy Lynn Whittington's good character and reputation prior to July 29. He was regular in attendance at school, church, Sunday school and youth groups. He had been obedient at home and at school and subjected himself to the reasonable control of both his parents and teachers. Except for a finding that he was delinquent for having unlawfully killed Mrs. Willard, there is no other evidence upon which to base a finding of juvenile delinquency.

While one must read the entire Bill of Exceptions to gain the complete story, we have tried to set forth the pertinent parts much more in detail than usual, in order to include

an accurate portrayal of the factual situation as a part of this opinion.

At the close of the hearing held on September 2 to determine whether or not Buddy Lynn Whittington is a delinquent child as alleged, the Juvenile Judge, as shown by the Bill of Exceptions, after overruling a motion to dismiss the complaint, said:

> The Court finds that there has been a crime committed here, that there has been a homicide committed on this alleged victim; and the Court finds that there is probable cause to believe that this young defendant may have done this act, which, if done by an adult, would be a felony. And, at this time, it is the order of the Court that the boy be examined, physical and mental examination be made of such child, by the Bureau of Juvenile Research, called the Diagnostic Center of the Youth Commission."

Thereafter in accordance with further verbal instructions from the Judge, the following journal entry was signed and recorded:

> "On the 2nd day of September, 1966, appeared E. Raymond Morehart and S. Farrell Jackson, Prosecuting Attorneys on behalf of the State of Ohio; also appeared Buddy Lynn Whittington, an alleged delinquent child, with his parents, O. A. Whittington and Ollie Whittington, father and mother, and his attorneys, Judson C. Kistler and Jack Supman.
>
> "The said Buddy Lynn Whittington, a minor child of the age of 14 years, being brought before the Court, this cause came on to be heard on the complaint, and it appearing that all citations and warrants have been served and that all persons interested are now before the Court, and the Court having heard all of the evidence and being advised in said premises, finds that said Buddy Lynn Whittington is a minor under the age of eighteen, fourteen years of age, and is a delinquent child as set forth in the complaint, and that said Buddy Lynn Whittington has committed an act which would be a felony if committed by an adult.

"It is therefore ordered by the Court, pursuant to Section 2151.26 of the Revised Code of the State of Ohio, that William Rutherford, the Juvenile Probation Officer, make a full investigation herein and report the same to this Court. It is further ordered that said Buddy Lynn Whittington, a delinquent child, be committed to the Juvenile Diagnostic Center of the Ohio Youth Commission for a complete mental and physical examination, the results of which are to be forwarded to this Court. And this cause is continued pending investigation and the findings of the mental and physical examination. Exceptions saved to defendant."

Buddy's counsel did not approve the entry. Within twenty days, notice of appeal to this Court was filed from said judgment and particularly from the finding therein that Buddy is a delinquent child as set forth in the complaint. The appeal is on questions of law.

Section 2501.02, Revised Code, provides that the Court of Appeals has jurisdiction:

"Upon an appeal upon questions of law to review, affirm, modify, reverse or set aside or reverse judgments or final orders of courts of record inferior to the Court of Appeals within the district, *including the finding, order or judgment of a juvenile court that a child is delinquent, neglected or dependent,* for prejudicial error committed by such lower court." (underscoring added).

Section 2151.02, Revised Code, provides:

"As used in Sections 2151.01 to 2151.54, inclusive, of the Revised Code, 'delinquent child', includes any child

(A) Who violates any law of this state, ..."

Section 2151.26, Revised Code, provides:

"In any case involving a delinquent child under Sections 2151.01 to 2151.54 inclusive, of the Revised Code, who has committed an act which could be a felony if committed by an adult, the juvenile judge, after full investigation and after mental and physical examination of such child has been made by the Bureau of

Juvenile Research, or by some other public or private agency, or by a person qualified to make such examination, may order that such child enter into a recognizance with good and sufficient surety, subject to approval of the judge, for his appearance before the Court of Common Pleas at the next term thereof, for such disposition as the Court of Common Pleas is authorized to make for a like act committed by an adult; or the judge may exercise the other powers conferred in such sections in disposing of such case."

If said minor were to be bound over to the Common Pleas Court under the foregoing section, he would immediately become entitled to all the protections afforded an adult. He would at the same time lose the protection afforded a juvenile under the Juvenile Code and if indicted by a grand jury for unlawfully, purposely and maliciously killing another, contrary to Section 2901.05 of the Revised Code of Ohio and found guilty beyond a reasonable doubt he would, likewise as an adult, be subjected to a sentence of imprisonment for life.

On the other hand, when the jurisdiction of the Juvenile Court is not relinquished and a child is not charged, tried, convicted or imprisoned for the crime of unlawfully, purposely and maliciously killing another contrary to the criminal statutes of Ohio but is retained before the Juvenile Court to determine whether by his act or acts he has become a delinquent child, the purpose is not to punish him for crime but to determine whether he is a delinquent child and, if so, the extent to which the State is warranted in making provisions for his custody, and his welfare, in which case, under the provisions of Section 2151.38, Revised Code, the orders are temporary and continue only until terminated or modified, or until a child attains the age of 21 years. See Sections 2151.35 and 2151.38, Revised Code.

The value of the rights afforded a child by a Juvenile Code has been recognized by the Supreme Court of the United States as recently as March 21, 1966. See Kent vs. United States, 86 S. Ct. 1045.

"Syllabus 10.

District of Columbia Juvenile Court act permitting waiver of juvenile courts jurisdiction over child did

not authorize court, in total disregard of motion for hearing filed by counsel and without any hearing or statement or reasons, to decide that a 16-year-old minor should be taken from the receiving home for children and transferred to jail along with housebreaking, robbery and rape, be exposed to the possibility of a death sentence instead of treatment for a maximum in the particular case of five years, until he was 21.

"Syllabus 15.

The District of Columbia Juvenile Court's waiver of jurisdiction over 16-year-old defendant charged with housebreaking, robbery and rape was a critically important action determining vitally important statutory rights of juvenile."

Running through all of the cases, we find the common complaint of one who is treated as a juvenile that he is being deprived of the constitutional rights of an adult charged with crime and vice versa of the child as to whom jurisdiction of the juvenile court has been relinquished complaining that he has been deprived of his valuable statutory rights under the Juvenile Code.

In Cope v. Campbell, 175 O. S., 475, the Supreme Court of Ohio held that proceedings in the Juvenile Court are civil in nature and not criminal; that Section 2151.35, Revised Code, which provides for disposition of juvenile cases, implies protection for the minor and not punishment. Further that Section 10, Article I of the Ohio Constitution, and the Fifth and Sixth Amendments to the United States Constitution, being applicable only to the rights of accused persons charged with criminal offenses, do not apply.

In the opinion, at page 477, the Court said:

"The hearing in the Juvenile Court is upon the status of a minor child, in the nature of guardianship, and this is so even though the minor child is over 16 years of age and commits an act which, if committed by an adult, would constitute a felony. The legislature by this act clearly is not inclined to brand the appellant with a mark of infamy or to set a mark of disgrace upon him. It is for the purpose of correction and rehabilitation and not for punishment."

In the opinion, the Supreme Court further stated that there had been no violation of the Fourteenth Amendment of the United States Constitution. Also see, Ex parte Januszewski, 196 Fed., 123, decided by the U.S. Circuit Court, S.D., Ohio, and Pee v. United States, 274 Fed. 2nd, 556. Further see Prescott v. State, 19 O. S., 184, in which a minor 14 years of age burned a barn but was neither indicted or tried by a jury the Supreme Court of Ohio in the opinion said:

> "The provisions referred to in our state constitution relate to the preservation of the right of trial by jury, and to the rights of accused in criminal prosecutions. We do not regard this case as coming within the operation of either of those provisions. It is neither a criminal prosecution, nor a proceeding according to the court of the common law, in which the right of trial by jury is guaranteed.
>
> "The proceeding is purely statutory; and the commitment in cases like the present, is not designed as a punishment for crime, but to place minors of the description and for the causes specified in the statute, under the guardianship of the public authorities named, for proper care and discipline, until they are reformed, or arrive at the age of majority."

Likewise in the case of Wissenburg v. Bradley, Judge, 209 Iowa, 813, 67 A.L.R., 1075, appears the following comment:

> "The appellant is not being tried in this proceeding for any crime. The action is in a sense, a special proceeding provided by statute, wherein the state, by virtue of its authority as *parens patriae,* takes jurisdiction of the incorrigible child, and commits it, not to jail for punishment, but to a reformatory for its care, education and training. That such a statute and such a proceeding, without a trial by jury, does not violate either the federal or the state constitutional provisions, has been repeatedly held."

It has been argued that although this 14-year-old boy has not been charged with criminal responsibility under

the criminal statutes of Ohio, the finding that he is a delinquent as defined by the Juvenile Code is dependent upon a finding that he has violated the specific law of this State alleged in the complaint, which if violated by an adult would be a crime and therefore, that the burden of proof must be beyond a reasonable doubt. The answer is that he is not charged with the crime or with the consequences imposed upon one who is so charged and found guilty. If under the Juvenile Code, a child be determined to be dependent, neglected or delinquent, the Juvenile Court may place such child on probation or assume custody for the best welfare of the child in the manner provided. The further argument is then made that without trial for the specific crime upon which the finding of delinquency is dependent, the juvenile is left with the stigma of guilt in the eyes of the public for a crime which he may or may not have committed. The answer to this is one of educating the public to the end that such a misconception is removed. The public must understand that a child found to be a delinquent for having violated a law of this State has not been tried as a criminal under the criminal statutes and therefore must not be considered as having committed a crime. He has not been afforded the right of jury trial or other rights which one charged with crime would receive. Neither has he been found guilty beyond a reasonable doubt. He has only been found to be a delinquent under proceedings as authorized by the Juvenile Code by which he is afforded valuable rights not provided for an adult.

The proceeding being civil in nature and not criminal, a preponderance of the evidence is sufficient to warrant a determination that a minor is a delinquent, even though such determination involves a finding that a criminal statute has been violated by such minor. See State v. Shardell, 107 O. A., 338.

If some day a juvenile alleged to be a delinquent when the allegation of delinquency is dependent upon violation of law becomes afforded the same constitutional rights as an adult, it is likely that he will at the same time lose valuable rights now afforded him as a child as is the case when under Section 2151.26, Revised Code, supra, the Juvenile Court relinquishes jurisdiction and places a juvenile under recognizance to appear before the Common Pleas Court.

At present, a 14-year-old juvenile found to be delinquent for having violated a law of this State is subjected to no loss of liberty other than that to which a juvenile found delinquent for any other cause may be subjected, therefore his rights as a delinquent cannot be distinguished on this basis from those of any other delinquent.

Among the authorities which we have cited, the case of Cope v. Campbell, supra, is stare decisis, as to many of the issues herein.

The evidence contained in the record fails to disclose any thorough investigation by officials toward eliminating the possibility that Mrs. Gladys Willard may have been killed by some other person.

Buddy Lynn Whittington having been tried by the Juvenile Court as an alleged delinquent and not under the criminal statutes, and the burden of proof being by a preponderance of the evidence, we do not find the judgment of the Juvenile Court finding Buddy to be a delinquent child to be either against the manifest weight of the evidence or contrary to law. We find no violation of his constitutional rights and no error prejudicial to him. Neither do we find the Juvenile Code to be unconstitutional. Each of the assigned errors is overruled and the judgment is affirmed, with this cause to be remanded to the Juvenile Court for further proceedings according to law. The motion of the American Civil Liberties Union, filed after the time for filing briefs as fixed by rule of court and after hearing, to be permitted to file a brief amicus curae is overruled.

Journal entry to be submitted.

Judgment affirmed and cause remanded for further proceedings according to law.

Leland Rutherford, D. Deane McLaughlin, Paul D. Van Nostran, Judges.

IN THE COURT OF APPEALS, FAIRFIELD COUNTY, OHIO, FIFTH APPELLATE DISTRICT

Case No. 421

IN THE MATTER OF

BUDDY LYNN WHITTINGTON, AN ALLEGED DELINQUENT CHILD

ENTRY

This cause came on for hearing on the appeal of Buddy Lynn Whittington, from a judgment of the Juvenile Court of Fairfield County, Ohio, finding him to be a delinquent child.

The Court, on consideration of the briefs filed herein, the oral argument of counsel and on due consideration thereof, finds that the finding of the Juvenile Court that Buddy Lynn Whittington was a delinquent child is not against the manifest weight of the evidence or contrary to law. That there was no violation of his constitutional rights and no error prejudicial to him and we do not find the Juvenile Code to be unconstitutional, and we further find that the judgment of the Juvenile Court should be, and the same hereby is, affirmed and this cause is remanded to the Juvenile Court of Fairfield County, Ohio, for further proceedings according to law.

Further the Court, upon consideration thereof, does overrule the Motion of the American Civil Liberties Union for leave to file a brief amicus curiae.

The appellant to pay the costs of this proceeding.

Exceptions saved to the defendant appellant, and to the American Civil Liberties Union.

Leland Rutherford, D. Deane McLaughlin, Paul D. Van Nostran, Judges.

Approved:

E. Raymond Morehart, Prosecuting Attorney.

Jack Supman, Judson C. Kistler, H. J. Johnson, Attorneys for Appellant.

IN THE COURT OF APPEALS, FIFTH DISTRICT, FAIRFIELD COUNTY, OHIO.

No. 421

IN THE MATTER OF

BUDDY LYNN WHITTINGTON, AN ALLEGED DELINQUENT CHILD

NOTICE OF APPEAL

The Defendant-Appellant, Buddy Lynn Whittington, hereby gives Notice of Appeal on questions of law to the Supreme Court of Ohio from the judgment and final order of the Court of Appeals filed herein on the 16th day of January, 1967, affirming the judgment of the Juvenile Court of Fairfield County, Ohio and remanding the cause to the Juvenile Court of Fairfield County, Ohio.

Said appeal is on questions of law, is a case involving a constitutional question, is a case of public and great general interest and is on condition that a Motion to Certify be allowed by the Supreme Court of Ohio.

Jack Supman, Judson C. Kistler, H. J. Johnson,
Attorneys for Defendant-Appellant.

Copy delivered to E. Raymond Morehart, Prosecuting Attorney, this 16th day of January, 1967.

Jack Supman, Judson C. Kistler, H. J. Johnson,
Attorneys for Defendant-Appellant.

IN THE SUPREME COURT OF OHIO

Journal 48, Page 141

APPEAL FROM THE COURT OF APPEALS FOR FAIRFIELD COUNTY

This cause, here on appeal as of right from the Court of Appeals for Fairfield County, was heard in the manner prescribed by law, and, no motion to dismiss such appeal having been filed, the Court sua sponte dismisses the appeal for the reason that no substantial constitutional question exists herein.

It is further ordered that the appellee recover from the appellant its costs herein expended; that a mandate be sent to the Juvenile Court to carry this judgment into execution; and that a copy of this entry be certified to the Clerk of the Court of Appeals for Fairfield County for entry.

Journal 48, Page 139

MOTION FOR AN ORDER DIRECTING THE COURT OF APPEALS FOR FAIRFIELD COUNTY TO CERTIFY ITS RECORD

It is ordered by the Court that this motion is overruled.

* * * * *

SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1967

No. 36 Misc.

In the Matter of

BUDDY LYNN WHITTINGTON, Petitioner.

On petition for writ of Certiorari to the Court of Appeals of the State of Ohio, Fairfield County.

On consideration of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted. The case is transferred to the appellate docket as No. 701.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

October 9, 1967.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. 701

IN THE MATTER OF BUDDY LYNN WHITTINGTON.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF OHIO, FAIRFIELD COUNTY

BRIEF FOR THE PETITIONER

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. 701

IN THE MATTER OF BUDDY LYNN WHITTINGTON.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF OHIO, FAIRFIELD COUNTY

BRIEF FOR THE PETITIONER

Opinion Below

The memorandum opinion of the Ohio Court of Appeals for the Fifth District appears at Appendix 255 (hereinafter cited as "A." ——). It is reported at 13 Ohio App. 2d 11. The journal entry of the Court pursuant to its memorandum opinion appears at A. 272.

The journal entry of the Ohio Supreme Court dismissing the appeal for want of a substantial constitutional question appears at A. 274.

Jurisdiction

The orders of the Ohio Supreme Court dismissing the appeal and denying the motion to certify the record were entered on March 15, 1967. (A. 274.) The petition for certiorari was filed on April 11, 1967, and was granted on

October 9, 1967. The jurisdiction of this Court is invoked pursuant to 28 U.S.C., § 1257(3).

Constitutional Provisions and Statutes Involved

This appeal involves the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution; the Ohio Constitution, Article I, §§ 9, 10; the Ohio juvenile court statutes, Ohio Rev. Code Ann. §§ 2151.01-.99; and Ohio Rev. Code Ann. § 2901.05. Pertinent provisions are reprinted in Appendix A, *infra*.

Statement of the Case

This is an appeal from the judgment of the Juvenile Court of Fairfield County, Ohio, finding petitioner to be a delinquent child.

The sole basis for this adjudication of delinquency was the charge that petitioner had killed a neighbor, Mrs. Gladys Willard, in violation of the second degree murder statute of Ohio, Ohio Rev. Code Ann. § 2901.05. The District Court of Appeals held that:

> "Except for a finding that he was delinquent for having unlawfully killed Mrs. Willard, there is no other evidence upon which to base a finding of juvenile delinquency." (A. 264.)

The Crime

This case arose on July 29, 1966, in the village of Baltimore in Fairfield County, Ohio. Petitioner, an only child, lived there with his parents, Mr. and Mrs. Orville A. Whittington. He had become 14 years of age less than a week before.

Mrs. Willard, a close friend of the Whittingtons, lived across the street with her husband, Herman Willard, and one of her sons, Jack Willard, who had separated from his wife several months before. She was 63 years old. (A. 139, 145.) Other relatives of Mrs. Willard lived nearby. (A. 180-181, 194-195.)

Mrs. Willard was reported missing by some of her relatives on the afternoon of July 29. A search began, in which petitioner joined, together with other neighbors and relatives of Mrs. Willard and village law enforcement officials. People also searched their houses, and about 8 p.m., Mr. Whittington and petitioner found Mrs. Willard's body in their home, under the bed in petitioner's bedroom. She had been strangled. (A. 257-261.)

Upon the discovery of the body, principal law enforcement officials of the village and county—the police chief, the Prosecuting Attorney, a deputy sheriff, and the probation officer of the Juvenile Court—went to the Whittington home. There they interrogated petitioner, without warning him as to his privilege against self-incrimination and his right to counsel. Petitioner denied—and has consistently denied—any knowledge of how Mrs. Willard's body got under his bed. Under interrogation he stated that he had seen her about 8 a.m. that morning when she came to the rear door to return some hair curlers to his mother. (A. 261-263.)

Petitioner's Arrest and Confinement

On August 5, 1966, Elwood Phillips, Chief of Police of Baltimore, filed a complaint in the Juvenile Court alleging that petitioner was a delinquent child on the basis of the

murder of Mrs. Willard. (A. 12.)[1] This was sworn to in the presence of Judge Robert U. Hastings, who then issued a warrant for petitioner's arrest to William Rutherford, the Juvenile Court probation officer. (A. 19.)[2]

There is no doubt from the record that prior to the filing of the complaint and the issuance of the arrest warrant, Probation Officer Rutherford consulted *ex parte* with Judge Hastings about the case. There is, however, conflict and self-contradiction in Rutherford's testimony as to the extent of this consultation.

Rutherford testified that he investigated the case, conferred with Chief of Police Phillips and Prosecuting Attorney Morehart, and a decision was then made to bring charges against petitioner. He told the Prosecuting Attorney that he felt that petitioner participated in the crime. (A. 119-121.) He further testified:

> "Q. Before the affidavit was filed and before the warrant was issued by this Court, did you advise the Court of your findings?
>
> A. I advised the Court as to the situation that had happened, as to the evidence and what had happened. I didn't at that time have a lot of evidence, and the evidence was not confided to the Judge, no sir.
>
> Q. Did you advise the Court of your findings as a result of your investigation?

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[1] This was subsequently amended to include allegations of date and place of the murder. (A. 12, 120-121.) The original complaint was served on petitioner's parents. The amended complaint was served on petitioner's attorneys. (A. 121.)

[2] This warrant also was subsequently amended to incorporate the language of the amended complaint. (A. 19.) Petitioner's parents received a copy of the original warrant, and the amended warrant was served on petitioner's attorneys. (A. 121.)

A. I advised him I had been called there and that I was there and the type of situation that arose." (A. 120.)

Rutherford subsequently testified:

"*I informed the Court of the investigation, the kind of investigation, who was involved,* but as to the evidence, I did not." (A. 121.) (emphasis supplied)[3]

Petitioner was arrested and was placed in solitary confinement in a cell in the Fairfield County jail. (A. 64.) The cell had no electric light bulb and "the toilet and everything else" were in the same place. (A. 96.) He was imprisoned in the county jail, an adult penal institution, because there was no juvenile detention facility in the county. The Judge stated that he had tried to obtain a detention home years before. (A. 97.) Petitioner's minister—who was allowed to talk to him through the bars of the cell—testified that the jail was not a fit place of confinement, and that the county had needed a new jail for 30 years. (A. 96.) The Prosecuting Attorney agreed that "the place we have for detention of juveniles is not all that is to be desired, your Honor; no argument about that. But it is the only thing that we have . . . ." (A. 68.)

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[3] Judge Hastings asserted at the adjudicative hearing that Rutherford denied consulting with him about the facts of the case prior to the complaint, and stated:

"The fact has been established that he didn't." (A. 122.)

There was no testimony from the Judge himself as to the extent of the consultation. The Judge thereafter foreclosed further inquiry by the defense into what Rutherford reported to him about the case prior to the complaint and the warrant. (A. 122-123.)

Petitioner's Motion for Release Pending the Adjudicative Hearing

Petitioner's attorneys commenced efforts to have him released on bond pending the adjudicative hearing, or to the custody of his parents, or at least transferred to the juvenile detention home in nearby Franklin County. (A. 63.)[4] On August 25, 1966, after petitioner had already been in solitary confinement in the jail for 20 days, an evidentiary hearing was held before Judge Hastings on the motion for pre-hearing release.[5]

Ten witnesses, including petitioner's neighbors, teachers, minister, and Sunday School superintendent, testified in support of this motion. As the District Court of Appeals summarized their testimony:

> "There was an abundance of evidence as to Buddy Lynn Whittington's good character and reputation prior to July 29. He was regular in attendance at school, church, Sunday School and youth groups. He had been obedient at home and at school and subjected himself to the reasonable control of both his parents and teachers." (A. 264.)

Every one of these witnesses agreed that there was no risk to the community if petitioner was released to the custody of his parents. (*E.g.*, A. 71-72, 74-75, 78-79.) One of his neighbors offered to take petitioner into his own

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[4] They moved for such relief on August 10th and 24th. (A. 24, 30.)

[5] The defense was ready for adjudicative hearing on August 11, 1966, but the State was not. (A. 110.) The case was continued until August 24, 1966, at which time the State was still not ready for trial on the merits. (A. 41, 111.)

home pending the hearing. (A. 81.) Another neighbor gave the following testimony:

> "Q. And if the Court would see fit to place Buddy under a bond or in the custody of his parents during the pendency of this case, would you have on behalf of your family or your children or yourself or your neighbors, have any fear that there would be any risk involved?
>
> A. No sir. There is more fear right now, than what there would be if Buddy were out.
>
> Q. There's more fear in what way?
>
> A. All ways. We're sure Buddy didn't do this. We don't know who did it.
>
> Q. In other words, there's feeling in the community that someone else may have done this?
>
> A. Yes." (A. 78-79.)

Several other witnesses gave similar expression to the belief that petitioner was innocent until proved guilty. (*E.g.*, A. 82, 85-86, 88.) Petitioner's Sunday School superintendent stated:

> "I feel that he's not guilty and I feel there is no risk." (A. 92.)

Petitioner's mother testified that she visited him in jail, and:

> "he sits there all day long; sometimes he doesn't say much when we go in. I think his mind might be dulled by being there. There's nothing for him to do, just sit there. It would affect your mind, too, or anybody's." (A. 100.)

Petitioner's mother and father both testified that in their opinion it would be injurious to his health and well-being for him to remain in the jail. (A. 99, 102.) They said that they would devote themselves full time to his care and supervision if he were released to their custody pending the hearing, would be responsible for his appearance at all court hearings, would sign a bond putting up their home for security if necessary, and would accept any other condition on his release that the Court might impose. (A. 98-100, 102.)

The Prosecuting Attorney offered no evidence to rebut this showing. His cross-examination consisted essentially of asking the witnesses if their opinion as to the risk from petitioner's release would be different if they believed petitioner guilty. (*E.g.*, A. 76-77, 79, 85-86.) He stated:

> "The fact that the parents of the child here are good people, I don't think that that has much to do with the question here involved, your Honor, as to whether he should be released or not . . . . I don't care how law abiding the boy has been, if he committed the act with which he is charged here, then I say that it is of such a serious offense and of such a serious nature that he should not be released to these parents or not be released to anyone else while this is pending." (A. 68.)

At the conclusion of this hearing, Judge Hastings denied pre-hearing release with the following statement:

> "This isn't a case of what public opinion, popularity poll, might be about this thing. This Court has a responsibility to this community. This Court has a responsibility to this young man. Motion denied." (A. 104; see also A. 40.)

Petitioner was returned to his solitary confinement.

The Adjudicative Hearing

The hearing to adjudicate the delinquency charge was held September 2, 1966. Several motions by petitioner's counsel, challenging the validity of the proceeding under various provisions of the Federal Constitution, were denied at the outset. These included:

(1) A motion for dismissal of the proceeding because of denial of petitioner's right to pre-hearing release and his subjection to cruel and inhuman punishment by his solitary confinement in an iron cage in the county jail, which had by then already lasted 27 days. (A. 45-46, 108-109, 114.)

(2) A motion to suppress all statements derived from his interrogation by law enforcement officials without warning as to his privilege against self-incrimination and right to counsel. (A. 46, 109, 123-125.)

(3) A motion to dismiss the proceeding because of the unconstitutionality of the Ohio juvenile code in denying him a fair and impartial trial. (A. 114, 123.) In this regard, petitioner asserted that the Ohio code, by authorizing the Court's own probation officer to investigate the case and report to the judge about it, providing for the same judge to pass on the issuance of an arrest warrant, and empowering him then to try the case on the merits, precluded a fair and impartial trial. (A. 42-43, 115-117.)[6]

[6] Petitioner's counsel also moved for dismissal because immediately prior to the commencement of the hearing, the Judge, Probation Officer Rutherford, Police Chief Phillips, Prosecuting Attorney Morehart, and two other witnesses to be called at the hearing, were seen conferring together in the Clerk's Office; other witnesses to be called by the State were in the witness room next door, with

In substance, the case against petitioner consisted of the fact that Mrs. Willard's body was found under his bed, together with circumstances, opinion testimony, and his statements under interrogation, from which the State sought to raise the inference that he was the last person to see her alive. This evidence was as follows:

1. The county coroner testified that he examined the body about 8:45 p.m. on July 29, 1966; that in his opinion death had occurred approximately 12 hours before, *i.e.*, between 8 and 9 a.m.; and that in his opinion the body had been lying in the same position for about 12 hours. (A. 153-154.) The State also sought to establish the same approximate time of death by a pathologist from Ohio State University, who estimated it as from one and a half to three hours after Mrs. Willard ate her last meal. (A. 166-167.) Herman Willard, the decedent's husband who was a farmhand employed on a nearby farm, testified that they had breakfasted together about 5:45 a.m. on July 29, before he went to work at 6:00 a.m. (A. 132-133.)

2. Mrs. Aurilla Goodrich, Mrs. Willard's sister, testified that she had been expecting Mrs. Willard to come to their mother's home about 10:30 a.m.; she called the Willard home several times when Mrs. Willard did not arrive and

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an opening between the two rooms which allowed all conversations to be heard in either room. The Judge summarily overruled this motion, and the record is silent as to what was said at this *ex parte* conference. (A. 106.)

Other grounds for dismissal asserted were denial of the right to a speedy trial and failure to provide a court reporter who could read back questions from her notes as asked. (A. 46-47, 109-110.)

A previous motion, filed August 10, 1966, had asked for dismissal on the ground that the entire juvenile court act was unconstitutional (A. 27); it had been denied August 11, 1966. (A. 37.)

got no answer; and, becoming concerned, she went with her husband to the Willard home about 12:10 p.m. and found no one there. She said that she then knocked on the door of the Whittington home across the street and petitioner came to the door. She quoted petitioner as telling her that his parents had gone to Canton early that morning and that Mrs. Willard "was over there that morning and brought some curlers back." (A. 181-183.)

3. Police Chief Phillips testified that during the search for Mrs. Willard that afternoon, he had talked to people in the village. He said that the only people he found who had seen Mrs. Willard that day were a Mrs. Estep, who saw her feeding her chickens about 6:30 a.m., and a Mrs. Barber, who saw Mrs. Willard drawing water in her own yard about 7:30 or 7:45 a.m. (A. 203.)

He also testified:

> "Q. Would you know, Mr. Phillips, in checking the people of the community or any of the neighbors and so forth, did you find anybody who saw Mrs. Willard, Gladys Willard, alive after eight o'clock in the morning?
>
> A. No." (A. 211.)[7]

4. Chief Phillips also testified as to his interrogation of petitioner on the night of July 29.[8] He had known peti-

[7] Phillips also stated that he had "checked out" alibis on members of the Willard family after the crime. (A. 210.) He said that he had asked neighbors if there were any "strange" people in the neighborhood that day and had found nobody. (A. 211.) Phillips' hearsay testimony was admitted without objection.

[8] This was over continuing defense objection that any statements of petitioner were obtained in violation of his federal constitutional rights. (A. 206-207.)

tioner for six or eight years. (A. 202.) He recounted petitioner's oral statements to him under interrogation as follows:

"A. 'I asked Buddy if he were there all morning, and he said "Yes." And I asked him if he was alone, and he said, "Yes." I asked him if he had seen Mrs. Willard, and Buddy stated yes, she had come to the door about eight o'clock, returned the curlers and left, but he did not know where she went.'

Q. By the way, did you see these curlers?

A. Yes, I saw the curlers.

Q. Where were they at the time you saw them?

A. They were in the kitchen." (A. 207.)

* * * * *

"Q. Did you have any further conversation with Buddy Whittington at that time?

A. Yes. I asked Buddy if he were there all day and he said he'd been out part of the day hunting Mrs. Willard; and, in fact, he said all day, about all day he had been hunting Mrs. Willard. And I made the statement that we were not called—she was not officially reported missing until three o'clock. Buddy stated he was out long before that and mentioned 11:30.

Q. You mean, mentioned 11:30?

A. Mentioned that he had been hunting her.

Q. Since 11:30?

A. Since about 11:30." (A. 208.)[9]

According to Chief Phillips, petitioner also stated that his parents had left early that morning, that he did not

[9] Mrs. Goodrich testified that petitioner had helped her and her husband search for Mrs. Willard shortly after noon. (A. 185-187.)

go to school that morning because he was sick, and that after his parents left he went in and lay down on the bed and turned on his record player. (A. 208-209.)

Chief Phillips also described a colloquy he had with Mr. Whittington, petitioner's father, during the course of this interrogation:

> "I've known him for years and years and always called him [Mr. Whittington] Bud, and I asked Bud if he knew what might have happened, and Bud stated, 'I don't know, unless this boy.' Buddy was standing right beside him." (A. 209.)

Testimony as to petitioner's statements under interrogation was also given by another interrogator, Probation Officer Rutherford. He said:

> "In talking with Buddy, he told me *he got up that* morning and dressed, and was going to go to school; but that after his parents left, he felt ill and he didn't go to school. And I was informed at that time that he attended a summer class at the Liberty Union School, or the Liberty Union High School, taking a course in mathematics, and he didn't go to school because he felt ill.
>
> Q. Did he tell you the nature of his illness?
>
> A. He said he had a stomach-ache.
>
> Q. Any other conversation?
>
> A. Yes. I asked him if he'd seen Mrs. Willard that day, and he told me that he had. That some time about eight o'clock, she come to the door to return some curlers that his mother had loaned her, or used in fixing Mrs. Willard's hair.
>
> Q. Did he say what door she came to?

A. Said she came to the rear door, and he said he didn't recall just exactly what she said, but she said something like, 'You-Who, anybody home?' Something like that. He just didn't recall exactly what it was, but he got up and went to the door. She handed him the curlers and he laid them there on the chair, I believe, or the table. I believe, it was the chair. And she turned and walked away. He said he didn't know which way she went, that he went back and lay down on the bed." (A. 218.)

Rutherford further testified:

"I asked Buddy if he had any idea of how Mrs. Willard's body had got under the bed, and he said he didn't know anything about it. I asked him if he had seen anybody else around the neighborhood that day, If there had been anybody come to the door, if there was anybody in the house; he said he hadn't seen anybody. I asked him if he'd left some time close to noon. He didn't know exactly what time it was. He thought it was some time right after eleven o'clock, but he wasn't sure. He said he left after a lady came who was a sister of Mrs. Willard and told him that Mrs. Willard was missing. Then, I think, he said he changed his clothes and went to the berry patch to look for Mrs. Willard."

• • • • •

"I asked him—he told me he'd gone to look for her and I asked him how he knew she was missing. And he said this lady had come and told him, asked if she was at the house and asked him if he knew anything about her, that she'd been missing. They couldn't find her. He then said that he went to look for her, and in the afternoon after he'd looked for her, looked in the

berry patch, then he came back and went to baseball practice." (A. 218-219.)

The circumstances under which this interrogation took place appear from the record as follows: Chief Phillips was called back to the Whittington home about 8:20 p.m., after the discovery of the body by Mr. Whittington and petitioner. He and Chief Grile of the Fire Department went in and saw petitioner and his father there. (A. 203-204.) After examining the body, Phillips called the Sheriff's Department to get the coroner and the photographer. The coroner, the photographer, and Deputy Sheriff Berry arrived. (A. 206.)

After the coroner's examination and the photographing of the room, Phillips and Berry began to interrogate petitioner. Petitioner's parents were present during the interrogation, which took place in the Whittington home. (A. 206.) Prosecuting Attorney Morehart and Probation Officer Rutherford arrived during the course of the interrogation. (A. 209.) Its total duration is not established precisely by the record, but Rutherford testified that he was called by the Sheriff's Office shortly after 10:00 p.m. to go to Baltimore at the request of the Prosecuting Attorney. (A. 119.)

At one point Rutherford accused petitioner of committing the offense, according to petitioner's father. (A. 237.) During the period of the interrogation, the law enforcement authorities were controlling access to the Whittington home: the photographer was admitted by Chief Phillips (A. 127); the coroner was "conducted into the home by Chief Phillips (A. 151); Rutherford found the door locked when he got there, and was admitted by Deputy Sheriff

Berry (A. 217); and Mrs. Goodrich, the decedent's sister, was ordered out of the Whittington home by the Fire Chief when she tried to go in to see her sister's body. (A. 191.)

Although the Prosecuting Attorney stated at the outset of the hearing that "the evidence will probably bring out that the defendant was warned" of his privilege against self-incrimination and his right to counsel (A. 124) it never did so.[10]

Against the evidence by which the State sought to connect petitioner to Mrs. Willard's death, there emerged a mass of conflicting testimony from the State's own witnesses:[11]

1. On cross-examination of the medical experts, the time of Mrs. Willard's death—which the State had tried to establish was about 8:00 a.m.—became indefinite. The coroner testified that death could have occurred "eleven to sixteen hours or more" before the time of his examination at 8:45 p.m. that night. (A. 160.) The pathologist testified that from the condition of the body, death could have occurred at any time on July 29. (A. 167.)

2. The place of death became equally uncertain. The coroner testified:

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[10] In arguing that *Miranda* v. *Arizona*, 384 U.S. 436 (1966), was inapplicable, he stated: "I think the case has gone way too far as it is, and I don't think certainly that it should be extended." (A. 125.)

[11] Petitioner offered no witnesses at the adjudicative hearing, but it was stipulated that the testimony at the bond hearing attesting to his good character and reputation should be considered part of the record of the adjudicative hearing. (A. 239.)

"Q. Could the body, in your opinion, have been someplace else other than in the position that you found it at any time after the death occurred?

A. It is quite possible. I do not know where she was killed."

* * * * *

"Q. Doctor, could the body have been at some other location in this same position and moved over to the location as shown in State's Exhibit 1?

A. That's true." (A. 160.)

There was no evidence of disarray in petitioner's room or the Whittington home, although whoever killed Mrs. Willard did so with such force as to break four of her ribs. (A. 164, 233.) In the opinion of the coroner, Mrs. Willard had not been pushed under the bed but whoever committed the crime had lifted up the full-sized bed, placed the body underneath it, and then replaced the bed. (A. 156, 299; State's Exhibits 1-4.)

3. Access to the Whittington house by other persons was readily available. The key was kept outside the house in the corner of the patio and could be seen from the outside. (A. 234-235.) When the parents returned, the key was not in its usual place. (A. 225.)

4. There is no dispute that petitioner was out of the house at various times during the day. Shortly after noon he helped Mrs. Goodrich and her husband search for Mrs. Willard in the berry patches. (A. 185-187.) About 4:00 p.m., Chief Phillips ran into him still looking for Mrs. Willard with other boys in the village; petitioner helped Phillips hunt for her. (A. 208.) His parents returned home

about 7:30 p.m., and he was practicing baseball with the Little League team on the school grounds at that time. (A. 225.) He told his father that he had also been out of the house that morning, three lots away and back in a berry patch with his B-B gun, at places from where the back door of his house could not be seen. (A. 236.)

5. Mrs. Willard's whereabouts and movements during the day were uncertain. Members of her family believed that she had gone picking blackberries when she did not appear at her mother's that morning. They testified that she was accustomed to pick berries in good weather, and the initial search for her was in the berry patches. They also said that she usually untied her dog when she went berry picking so that it could follow her; the dog was found running loose by Chief Phillips during the afternoon. (A. 181-182, 193, 197, 212-213.)

6. There was no motive or reason for petitioner to kill Mrs. Willard, nor did he show any consciousness of guilt. Her husband said that Mrs. Willard was a good friend of the Whittingtons and petitioner. (A. 145.) Although Mrs. Willard's clothing was disarrayed as if her assailant might have had sexual designs on her, there was no medical evidence of sexual attack. (A. 163-164.) When the body was discovered, petitioner said "Oh, no," or "Can't be," and according to his father: "He was about as much surprised as I was, I think . . . . He was shocked about it. I could tell." Prior to the discovery of the body, "he was just as normal as he could be . . . ." (A. 228, 235.) Chief Phillips, when asked petitioner's reputation in the community, replied: "I've never had a minute's trouble with Buddy, let's put it that way." (A. 212.)

7. On the other hand, petitioner's father testified that there had been constant quarreling for the last two years between Mr. and Mrs. Willard, which could be heard from almost any room in the Whittington house. (A. 235.) Mr. Whittington said that he first began to search his own home because: "her and her husband had trouble, and Jack's there; and him and his wife have a lot of trouble. And I thought it was more than she could take, and I figured she would rather die in our house than in her own home." (A. 227.) The Willards' son Jack agreed that there was quarreling between his parents which might have been heard 200 feet away if the windows were open. (A. 177.)

8. Herman Willard, the decedent's husband, admitted on cross-examination that he drove his car home at 8:16 on the morning of the murder. (A. 140.) He was then induced to correct his testimony on redirect examination and denied that he had come home at any time between 6:00 a.m. and 2:00 p.m., the time he said he learned that his wife was missing. (A. 143-144.) With respect to his admission of coming home on the morning of the murder, he then said on further cross-examination:

> "I may have said something that I shouldn't. I don't know. I come back in home every once in a while, but I don't know if that was the date or what. . . . I could not tell you if I drove back or not." (A. 145-146.)

He also admitted knowing that the Whittingtons were going to be out of town on the day of the murder. (A. 149.)

The Juvenile Court's Finding

At the close of the State's evidence the defense moved for dismissal of the complaint on the ground that the

charge had not been proved. (A. 237.) Judge Hastings took a ten-minute recess and overruled the motion. (A. 239-240.) He then made the following statement:

> "The Court finds that there has been a crime committed here, that there has been a homicide committed on this alleged victim; and the Court finds that there is probable cause to believe that this young defendant may have done this act, which, if done by an adult, would be a felony." (A. 240.)

The journal entry, filed September 7, 1966, recites that the Juvenile Court:

> "finds that said Buddy Lynn Whittington is a minor under the age of eighteen years, fourteen years of age, and is a delinquent child as set forth in the complaint, and that said Buddy Lynn Whittington has committed an act which would be a felony if committed by an adult." (A. 54.)

Petitioner was ordered committed to the Juvenile Diagnostic Center of the Ohio Youth Commission for examination. (A. 56, 240-241.)

Decision of the District Court of Appeals

Petitioner appealed the adjudication of delinquency to the District Court of Appeals. (A. 58.) The Prosecuting Attorney moved to dismiss the appeal on the ground that the order was not final. (A. 248.) By order and memorandum of September 30, 1966, the District Court of Appeals overruled the motion to dismiss the appeal. (A. 249, 251.) The Court held in abeyance petitioner's motion for bond or release to his parents' custody pending the appeal. (A.

249, 251.) Petitioner was thereafter returned from the Juvenile Diagnostic Center and again imprisoned in the Fairfield County jail.

On December 22, 1966—after petitioner had spent a total of 78 days in solitary confinement in the jail—the District Court of Appeals held on the basis of its personal view of the premises that this was an illegal place of confinement for petitioner under Ohio law. It overruled the motion for bond or release to his parents, but ordered the Juvenile Court to make a custody order in conformity with law. (A. 253-254.) Petitioner was subsequently transferred to the detention facility of Franklin County.

On January 3, 1967, the District Court of Appeals affirmed the judgment of delinquency. The Court found "no violation of his constitutional rights and no error prejudicial to him. Neither do we find the Juvenile Code to be unconstitutional." (A. 271.) It overruled each of his constitutional claims, declaring it settled law in Ohio juvenile cases:

> "that the Fifth and Sixth amendments to the United States Constitution, being applicable only to the rights of accused persons charged with criminal offenses, do not apply." (A. 268.)

With respect to the burden of proof, the Court held that:

> "The proceeding being civil in nature and not criminal, a preponderance of the evidence is sufficient to warrant a determination that a minor is a delinquent, even though such determination involves a finding that a criminal statute has been violated by such minor." (A. 270.)

It further concluded that, under this standard of proof, the Juvenile Court judgment was not "against the manifest weight of the evidence." (A. 271.) But it also stated:

> *"The evidence contained in the record fails to disclose any thorough investigation by officials toward eliminating the possibility that Mrs. Gladys Willard may have been killed by some other person."* (A. 271.) (emphasis supplied)

Questions Presented

1. Was petitioner, a 14-year old boy, denied due process and equal protection in the proceedings which adjudicated him a delinquent, when: the sole basis for the judgment of delinquency was the charge that he had committed murder; the juvenile court found that there was "probable cause" that he "may have done this act;" and the state appellate court affirmed the judgment by applying as a standard of proof in his case the "preponderance of the evidence" test of ordinary civil cases?

2. (a) Was petitioner denied due process and equal protection, when: the juvenile court probation officer investigated the case, participated in the decision to file the delinquency charge against petitioner, and reported the results of his investigation *ex parte* to the juvenile court judge; and the same judge proceeded to issue a warrant for petitioner's arrest and to try the charge on the merits?

(b) In a delinquency proceeding based solely on a charge that a juvenile has committed a serious violation of state criminal law, in this case murder, may the accused juvenile constitutionally be denied trial by jury of the issue whether he committed the act charged?

3. Was petitioner denied due process by the admission into evidence of statements obtained from him under interrogation by law enforcement officials who did not warn him of his privilege against self-incrimination and right to counsel?

4. Was petitioner denied due process and equal protection when: the juvenile court refused to release him to the custody of his parents or on bond pending his adjudicative hearing, although he was charged with an offense bailable as of right for an adult and undisputed evidence showed that there was no significant risk of flight or danger to the community from his release; as a result of the refusal to release him, he was imprisoned for 27 days in solitary confinement in an adult jail prior to his adjudicative hearing; and he was thereafter subjected to further solitary confinement totaling 78 days until his imprisonment under these circumstances was held to violate state law by the court below?

Summary of Argument

I.

This was a juvenile delinquency proceeding based solely on the charge that petitioner had committed a serious violation of state criminal law, murder. He faced potential incarceration in a state institution as an adjudicated delinquent for up to seven years, as well as other serious sanctions and stigma.

The courts below applied constitutionally impermissible standards of proof in adjudicating him a delinquent. The juvenile court found that there was "probable cause" to

believe that he "may have done this act." The state appellate court affirmed the judgment by applying the "preponderance of the evidence" test of ordinary civil cases.

The "probable cause" test is not a standard for the determination of guilt and cannot support a delinquency adjudication. The "preponderance of the evidence" test applied below rested on the now discredited "'civil' label-of-convenience" for juvenile delinquency proceedings. This Court in *In re Gault*, 387 U.S. 1 (1967), rejected the "civil" label as a sufficient justification for denying juveniles rights accorded to adults.

The "preponderance" test is incompatible with the generally accepted principle that when personal liberty and reputation are at stake, the state must meet a higher standard of proof than that of ordinary civil cases. The trend of authority has turned against the "preponderance" test in delinquency cases based on serious violations of state criminal law. This test is also unfairly discriminatory against juveniles, since adults charged with offenses in both the adult and juvenile courts of Ohio must be proved guilty beyond a reasonable doubt.

The proper test in a case such as this one is proof beyond a reasonable doubt, or at the minimum, proof by "clear, unequivocal, and convincing" evidence. The "reasonable doubt" test is in accord with history and usage and is superior to all others in protecting against miscarriages of justice.

Under a constitutionally permissible standard of proof, the evidence in this case is insufficient to uphold the judgment below.

II.

A. Petitioner was denied a fair trial of the delinquency charge by an impartial trier of fact. The juvenile court judge participated personally and through his official arm, the probation officer, in the investigative and accusatory phase of the case and had *ex parte* access to the facts prior to the adjudicative stage.

The juvenile court probation officer investigated the case, reached the opinion that petitioner had committed the offense, participated in the decision to file the charge, reported the results of his investigation to the juvenile court judge *ex parte,* and testified against petitioner. The judge, after hearing the results of the investigation, issued a warrant for petitioner's arrest and proceeded to try the case on the merits.

These factors created a substantial danger of prejudgment by the judge as trier of fact and deprived the adjudicative hearing of both the substance and the appearance of fairness. Authoritative commentary in the juvenile court field is strongly opposed to the intermingling of functions and *ex parte* access to the facts in advance of adjudication such as occurred in this case.

B. In a delinquency proceeding based solely on a serious violation of state criminal law, an accused juvenile cannot constitutionally be denied trial by jury of the issue whether he committed the act charged. The reasons which have led to the establishment of trial by jury as the mode of trial in adult criminal cases are at least as compelling in delinquency cases based on serious law violation charges.

A jury as trier of fact is superior to a single judge in a case like the present, because the jury system assures application of a proper standard of proof, brings about due deliberation on the issues, guarantees individualized attention to each case and to the credibility of each witness, protects against official arbitrariness, and provides a means of implementing constitutional exclusionary rules of evidence without prejudicing the determination of the facts.

Jury trial will not impede the proper functioning of juvenile courts or interfere with their attainment of their legitimate objectives. Juvenile court judges have no expertness or special knowledge requiring that they be the sole triers of fact in the adjudicative stage of serious law violation cases. The desire for "informality" in juvenile proceedings cannot override the need to guarantee an accused juvenile a fair fact-finding procedure.

III.

Admission into evidence of petitioner's statements under interrogation violated his constitutional rights under *Miranda* v. *Arizona*, 384 U.S. 436 (1966).

The *Miranda* guarantees should be held applicable to official interrogation of juveniles suspected or accused of violations of state criminal law. *Gault* establishes that juveniles are entitled to the privilege against self-incrimination. The need to protect juveniles from abridgement of the privilege during pre-trial interrogation is far greater than in the case of adults. A juvenile as young as petitioner cannot be assumed to know his constitutional rights or how to assert them. The necessity for the *Miranda* guarantees is especially great, when, as here, the offense

is serious and the juvenile faces loss of his liberty for a substantial number of years. Current authority in the juvenile court field is overwhelmingly in favor of according the *Miranda* guarantees to juveniles suspected or accused of law violations.

On the facts of this case, the *Miranda* principles were violated. Petitioner was the prime suspect in the investigation. He was deprived of his freedom of action during the interrogation; the authorities were controlling all access to his home. He was interrogated by law enforcement officials who did not warn him of his privilege against self-incrimination and right to counsel.

His statements under interrogation should also have been excluded as involuntary under the circumstances of this case. He had just turned 14, had no previous contact with the law, was interrogated by a battery of principal law enforcement officials of his village and county, and was not warned of his constitutional rights. This interrogation was inherently coercive.

IV.

A. Petitioner was denied due process and equal protection when the juvenile court judge refused to release him to the custody of his parents or on bond pending his adjudicative hearing. Undisputed evidence showed that there was no significant danger of flight or danger to the community from his release. There was overwhelming and uncontradicted evidence of his good character and reputation in his community. His parents were willing to accept any condition imposed by the court to assure his appearance at trial.

He was charged with an offense, second degree murder, which was bailable as of right for an adult. Denial of release abridged the presumption of his innocence. As a result of its denial, he was imprisoned for 27 days prior to adjudicative hearing in solitary confinement in an adult penal institution, which was subsequently held by the state appellate court to be an unfit and illegal place of confinement for him.

Abuses of pre-hearing detention, of which this case is an aggravated example, are widespread in this country, according to recent studies. Many states have recognized either a right to bail for juveniles or its substantial equivalent in the form of a right to pre-hearing release under prescribed judicial standards and under appropriate conditions. Such a right should be declared as a matter of federal constitutional law for juveniles accused of law violations.

B. Petitioner was imprisoned in solitary confinement in an adult penal institution for 78 days during the juvenile proceedings, 27 of them prior to adjudicative hearing. This constituted the infliction of cruel and inhuman punishment, especially in view of the state's professed policy that juvenile delinquents should receive "treatment" and "rehabilitation."

This Court has characterized solitary confinement as cruel and unusual punishment even for convicted adult murderers. Petitioner, who had just turned 14, was subjected to such imprisonment for a substantial period both before and after adjudication, although under the state law he is not supposed to be a criminal but a person in need of "treatment." The proceedings against him should be in-

validated, in order to enforce the constitutional prohibition against cruel and unusual punishment.

The punishment of petitioner in this fashion also destroys any contention that denial of his procedural rights can be justified on the theory that the state gave him special consideration or treatment in return. Petitioner was denied basic constitutional rights of adults charged with crime and yet was treated far worse than an adult defendant would have been.

ARGUMENT

Introduction

This case raises important procedural questions relating to the conduct of juvenile delinquency proceedings, which were not explicitly resolved by this Court's decision last Term in *In re Gault*, 387 U.S. 1 (1967).

Two of these issues concern constitutional rights at the adjudicative stage of a delinquency proceeding:[12] whether a juvenile may be adjudicated a delinquent on a mere preponderance of the evidence and whether he has the right to a fair trial of the delinquency charge by an impartial trier of fact. The other issues relate to the pre-adjudicative stage of delinquency proceeding: whether a juvenile under interrogation by state officials is entitled to the constitutional guarantees established by *Miranda* v. *Arizona*, 384 U.S. 436 (1966), and whether he has a constitutionally protected right to release in appropriate circum-

[12] We here refer to and adopt the three-part analysis of the juvenile court process applied by this Court in *Gault*: pre-adjudicative; adjudicative; and dispositional. 387 U.S. at 13 and 31 n. 48.

stances and under appropriate conditions pending his adjudicative hearing. Finally, it presents the question whether a juvenile has a judicially enforceable constitutional right to be free from cruel and inhuman punishment by the state ostensibly acting in the role of *parens patriae*.

It is necessary at the outset to fix and delineate the context in which these issues arise in this case. This was a juvenile delinquency proceeding in which the sole basis for the adjudication of delinquency was the charge that petitioner committed an act which would be a serious crime if committed by a person over 18: murder in the second degree.[13] The delinquency adjudication rested entirely on this alleged law violation, under the Ohio juvenile code provision defining a "delinquent child" as one who "violates any law of this state . . . ."[14] There was no evidence on which a delinquency adjudication could have been made under any other provision of the Ohio juvenile code, and the District Court of Appeals so held. Indeed, the record affirmatively established that petitioner is of high moral character and reputation in his community. Thus the single issue presented for determination in the adjudicative stage of this case was the same as in any criminal case: did petitioner commit an act which the state has defined as a crime?

The charge of delinquency against petitioner—based on the allegation that he committed murder—carried potential consequences of enormous magnitude for him. The Ohio juvenile code authorizes drastic sanctions against an adjudicated delinquent, among them:

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[13] Ohio Rev. Code Ann. § 2901.05.

[14] *Id.* § 2151.02(A).

(a) Commitment to a state custodial institution which can last for the period of his minority, *i.e.*, until 21.[15]

(b) Certification of a delinquent "who has committed an act which could be a felony if committed by an adult" to the court of common pleas for trial as an adult.[16]

Thus petitioner faced in this proceeding the stigma of being labeled a murderer; the possibility of seven years incarceration in a state institution; and the further threat of certification for trial for murder as an adult after being found a delinquent.

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[15] Ohio Rev. Code Ann. § 2151.35(B), authorizes the juvenile court, upon a finding of delinquency, to:

> "Commit the child temporarily or permanently to the division of social administration of the department of public welfare, or to a county department of welfare which has assumed the administration of child welfare, county child welfare board, or certified organization, or to the youth commission or to a county or district training facility created under section 2151.65 of the Revised Code, or to any institution, or to any agency in Ohio or in another state authorized and qualified to provide or secure the care, treatment, or placement required in the particular case."

Commitments may continue until the juvenile is 21. Ohio Rev. Code Ann. §§ 2151.38, 5139.05(C). The youth commission may place him in an institution "under such condition as it deems best designed for the training and rehabilitation of the child and the protection to the public." *Id.* § 5139.06(A).

[16] *Id.* § 2151.26. In addition, so-called "incorrigible" juveniles over the age of 16 may be transferred administratively from a juvenile institution to the state reformatory, an adult penal institution. *Id.* § 5139.24. A male juvenile delinquent over 16 who has committed an act which if committed by an adult would be a felony may be committed by the juvenile court directly to the state reformatory. *Id.* § 2151.35(E). A male between 16 and 21 who is convicted of a felony as an adult is sentenced to the reformatory if he has not previously served a felony sentence, except that all males convicted of first or second degree murder go to the penitentiary. *Id.* § 5143.03.

As we shall demonstrate, despite these drastic consequences of the determination that he murdered Mrs. Willard, petitioner was denied procedural rights which have been deemed fundamental protections for persons charged with criminal offenses. As we shall also demonstrate, Ohio law is grossly disproportionate in its procedural treatment of juveniles and adults charged with identical conduct. Persons over 18 have all the rights for which we contend in Ohio adult courts; persons over 18 have these same rights in Ohio juvenile courts when tried for offenses in violation of the juvenile code;[17] but juveniles charged with delinquency—even when based solely on violation of a state criminal statute—are afforded none of these rights.

If petitioner had been one week over 18 instead of one week over 14 when this case arose, and had stood trial for murder in the second degree, he would have had the rights: (1) to require the State to prove every element of the offense beyond a reasonable doubt; (2) to a fair trial by an impartial trier of fact, including a jury if he so desired; (3) to exclusion from evidence of all statements obtained from him by state officials in disregard of the requirements of *Miranda* v. *Arizona, supra;* (4) to release on bail prior to trial; and to freedom from punishment of any kind in advance of conviction and from cruel and unusual punishment at any time. As this Court said in *Gault*:

> "So wide a gulf between the State's treatment of the adult and of the child requires a bridge sturdier than mere verbiage, and reasons more persuasive than cliche can provide." 387 U.S. at 29-30.

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[17] Adults are tried in the Ohio juvenile courts for such offenses as contributing to the delinquency of a child, *id.* § 2151.41, and non-support of a child, *id.* § 2151.42.

It should be emphasized that we do not interpret this Court's decision in *Gault* as extinguishing all the distinctive features of juvenile court justice in this country or as requiring juvenile courts to become replicas of adult criminal courts. Nor do we make any such contentions in this case.

Gault pointed out unique aspects of the juvenile court system which it is important to preserve, such as "processing and treatment of juveniles separately from adults," avoiding classification of juveniles as "criminals," not imposing civil disabilities or disqualifications on delinquents, and maintaining confidentiality of juvenile court records and juvenile contacts with police. 387 U.S. at 22-25. None of these worthy features of the juvenile court system would be jeopardized in the least by recognition of the rights for which we contend in this case. Nor is the dispositional stage—potentially the most creative and flexible phase of the juvenile process for the achievement of the rehabilitative goals of the juvenile courts—involved in this case.

We also stress that cases like this—a delinquency proceeding based solely on an alleged act which would be a serious crime if committed by a person over 18, and carrying the threat of incarceration and other serious consequences for the juvenile—are a distinct minority of all juvenile contacts with the authorities. The National Crime Commission found that:

> "the informal and pre-judicial processes of adjustment compete in importance with the formal ones and account for a majority of juvenile dispositions." National Crime Commission, *The Challenge of Crime in*

a Free Society, p. 82 (1967) (hereinafter cited as *"National Crime Commission"*).[18]

Moreover, many other areas of juvenile court jurisdiction—even involving delinquency charges—are not based on alleged violations of state criminal laws. State juvenile court codes frequently confer jurisdiction over so-called "neglected" children,[19] "dependent" children,[20] children without "proper parental care,"[21] and other categories not involving alleged delinquency. Even under the rubric of delinquency, there are many categories which need not involve the violation of state criminal statutes, such as "incorrigibility,"[22] "habitual truancy,"[23] deporting oneself so "as to injure or endanger the morals or health of

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[18] "They include discretionary judgments of the police officer to ignore conduct or warn the child or refer him to other agencies; 'station adjustment' by the police, in which the child's release may be made conditional on his complying with designated limitations on his conduct; the planned diversion of alleged delinquents away from the court to resources within the school, clinic, or other community facilities, by such groups as mental health, social, and school guidance agencies; pre-judicial dispositions, at the intake stage of the court process, by probation officers or sometimes judges exercising a broad screening function and selecting among alternatives that include outright dismissal, referral to another community agency for service, informal supervision by the probation staff, detention, and filing a petition for further court action. In many courts the court intake process itself disposes of the majority of cases." *National Crime Commission*, p. 82.

[19] See Ohio Rev. Code Ann. § 2151.03.

[20] See *id.* § 2151.04.

[21] See *id.* § 2151.05.

[22] See *id.* § 2151.02(B).

[23] See *id.* § 2151.02(C).

himself or others,"[24] and others.[25] The rights for which we contend would have no necessary application to such cases.

Furthermore, recognition of the rights for which we contend would in no way impede—indeed it would enhance—the development of more flexible and informal techniques for handling and treating juveniles, not involving delinquency trials for law violations leading to possible incarceration. The National Crime Commission strenuously urged the development of such techniques, as this Court noted in *Gault*, 387 U.S. at 31 n. 48. The Commission called for "fullest feasible use of preliminary conferences to dispose of cases short of adjudication;"[26] employment of "consent decrees wherever possible to avoid adjudication while still settling juvenile cases and treating offenders;"[27] and continuing the movement for narrowing

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[24] See *id.* § 2151.02(D).

[25] It has been authoritatively estimated that over a quarter of that minority of all delinquency cases actually going to juvenile court for formal hearing involve charges not based on violations of state criminal laws. National Crime Commission, *Task Force Report: Juvenile Delinquency and Youth Crime*, p. 4 (1967) (hereinafter cited as *"Task Force"*).

[26] *National Crime Commission*, p. 84. Such conferences are statutorily provided for in New York and Illinois. See *Task Force*, p. 21; N.Y. Family Court Act § 734 (1962); Illinois Juvenile Court Act, Ill. Stat. Ann. Ch. 37, § 703-8 (Supp. 1966).

New Jersey, by rules promulgated by its Supreme Court, has recently differentiated delinquency cases into "formal" and "informal" calendars. The "formal" calendar contains those cases which, in the opinion of the juvenile court judge, "may result in the institutional commitment of the juvenile." New Rule 6:9-1(c) relating to procedure in the juvenile courts, effective September 11, 1967. The procedural requirements for the "formal" calendar are more stringent than those governing "informal" cases.

[27] *National Crime Commission*, p. 84. The consent decree procedure may enable the juvenile court judge to "short-circuit the more

juvenile court jurisdiction, to the end that juvenile courts should basically concern themselves with serious delinquency cases based on alleged violations of state criminal laws.[28] This case does not raise any procedural problems with respect to such informal techniques.

Like *Gault*, this case is concerned with the "precise impact" of due process and equal protection requirements in a "proceeding by which a determination is made as to whether a juvenile is a 'delinquent' as a result of alleged misconduct on his part, with the consequence that he may be committed to a state institution." 387 U.S. at 13. We submit that, when the gulf between adult and juvenile proceedings is as wide as it is here with respect to basic fact-finding procedures in the adjudicative stage and with respect to such critical matters as pre-trial interrogation and pre-trial detention of an accused, the burden should be on the state to show an overriding interest in the denial to juveniles of procedural rights which would be accorded as of course to adults. If divergence on a particular procedure can be justified in terms of the distinctive objectives or resources of the juvenile courts, it should be for the state to demonstrate that justification for departing in juvenile cases from the historic content of due process of law. See generally Dorsen & Rezneck, *In re Gault and*

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rigorous procedural requirements [of the adjudicative stage] and continue to make use of the flexibility and other advantages of informality where he thought it desirable." *Task Force*, p. 40.

[28] *National Crime Commission*, p. 85. As this Court noted in *Gault*, 387 U.S. at 24 n. 31, the concept of "persons in need of supervision" is emerging as a means of overcoming the " 'invidious connotations' " of the term "delinquent." It provides a means for differentiating juveniles whose alleged misconduct does not involve violations of state criminal law from those who do. See New York Family Court Act § 712 (1962); Illinois Juvenile Court Act, Ill. Stat. Ann. Ch. 37, § 702-3 (Supp. 1966).

the Future of Juvenile Law, 1 Family L. Q., December, 1967, p. 1 (1967).

With this introduction as to the scope and dimensions of the issues posed by this case, we turn to set forth the specific denials of constitutional right suffered by petitioner.

I.

Petitioner Was Denied Due Process and Equal Protection by Reason of the Standard of Proof Applied by the Courts Below.

This Court in *Gault* manifested an overriding concern with the accuracy of the fact-finding process in the adjudicative phase of juvenile delinquency cases. The Court said:

> "Failure to observe the fundamental requirements of due process has resulted in instances, which might have been avoided, of unfairness to individuals and inadequate or inaccurate findings of fact and unfortunate prescriptions of remedy . . . the procedural rules which have been fashioned from the generality of due process are our best instruments for the distillation and evaluation of essential facts from the conflicting welter of data that life and our adversary methods present. It is these instruments of due process which enhance the possibility that truth will emerge from the confrontation of opposing versions and conflicting data." 387 U.S. at 19-21.

This Court has recognized that the question of burden of proof—where it lies and how substantial it should be—

is critical to the determination of factual issues. In *Speiser* v. *Randall*, 357 U.S. 513, 520-521, 525-526 (1957), this Court said:

> "Thus the procedures by which the facts of the case are determined assume an importance fully as great as the validity of the substantive rule of law to be applied. *And the more important the rights at stake the more important must be the procedural safeguards surrounding those rights.*"
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> * * * * *
>
> "In all kinds of litigation it is plain that where the burden of proof lies may be decisive of the outcome. [Citations omitted]. There is always in litigation a margin of error, representing error in fact-finding, which both parties must take into account. *Where one party has at stake an interest of transcending value—as a criminal defendant his liberty—this margin of error is reduced as to him by the process of placing on the other party the burden of producing a sufficiency of proof in the first instance, and of persuading the factfinder at the conclusion of the trial of his guilt beyond a reasonable doubt. Due process commands that no man shall lose his liberty unless the Government has borne the burden of producing the evidence and convincing the factfinder of his guilt.*" (emphasis supplied)[29]

[29] Thus the Constitution also limits the powers of Congress and the states to create evidentiary presumptions and allow the prosecution thereby to discharge its burden of proof. *United States* v. *Romano*, 382 U.S. 136 (1965); *Tot* v. *United States*, 319 U.S. 463, 467, 469 (1943); *McFarland* v. *American Sugar Ref. Co.*, 241 U.S. 79, 86 (1916).

The question of the standard of proof in a juvenile delinquency hearing, which involves interests of "transcending value"—personal liberty and reputation—raises an issue of constitutional magnitude. We contend that the standard of proof applied by the courts below is incompatible with fair and reliable adjudication.

The standard of proof applied by the trier of fact below, the juvenile court judge, is glaringly at variance with established principles as to the evidence necessary for proof of guilt when personal liberty is in the balance. The juvenile court judge "found" that:

> "there has been a crime committed here, that there has been a homicide committed on this alleged victim; *and the Court finds that there is probable cause to believe that this young defendant may have done this act,* which, if done by an adult, would be a felony." (A. 240.) (emphasis supplied)

It is elementary that the "probable cause" standard has nothing to do with guilt; that it describes the quantum of evidence necessary to justify arrest, search, or detention for trial; and that it does not even amount to the "preponderance of evidence" necessary for proof of a fact in a civil case.

This Court made the distinction between "probable cause" and proof of guilt clear in *Brinegar* v. *United States,* 338 U.S. 160, 173, 174-175 (1949):

> "There is a large difference between the two things to be proved, as well as between the tribunals which determine them, and therefore a like difference in the quanta and modes of proof required to establish them."

* * * * *

"Guilt in a criminal cause must be proved beyond a reasonable doubt and by evidence confined to that which long experience in the common law tradition, to some extent embodied in the Constitution, has crystallized into rules of evidence consistent with that standard. These rules are historically grounded rights of our system, developed to safeguard men from dubious and unjust convictions, with resulting forfeitures of life, liberty and property."

"In dealing with probable cause, however, as the very name implies, we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act . . . ."

The distinction between "probable cause" and the quantum of evidence necessary for proof at trial is equally well-settled in non-criminal cases. Chief Justice Marshall said in *Locke* v. *United States,* 7 Cranch 339, 348 (1813), a condemnation action:

"[T]he term 'probable cause', according to its usual acceptation, means less than evidence which would justify condemnation . . . ."

Since the trier of fact in this case applied an impermissible standard of proof, the judgment against petitioner cannot stand, even if this Court were to give constitutional sanction to the "preponderance" test applied by the District Court of Appeals in holding that the judgment was "not against the manifest weight of the evidence." (A. 270-271.)

We contend, however, that the "preponderance" test applied by the District Court of Appeals is also inconsistent with constitutional standards of fair adjudication.

This "preponderance" test simply represented a mechanical carryover of the evidentiary standard applicable in the ordinary civil case, as the opinion of the District Court of Appeals makes clear. There was no recognition of how the interests of the juvenile at stake in this delinquency proceeding differed from the interests at issue in run-of-the-mill civil litigation. There was no independent consideration of the appropriate evidentiary standard in the light of those differing interests.

Thus the decision of the court below rests on an assumption which was exploded by this Court in *Gault*—that the denomination of a delinquency proceeding as "civil" validates the application of "civil" procedures and *per se* justifies the denial of procedural rights accorded as of course to adults in criminal trials. In holding the Fifth Amendment privilege against self-incrimination (and the Sixth Amendment right of confrontation and cross-examination) applicable in juvenile delinquency proceedings, this Court emphasized that for this purpose at least:

> "commitment is a deprivation of liberty. It is incarceration against one's will, whether it is called 'criminal' or 'civil.'" 387 U.S. at 50.

To hold otherwise, this Court said, *"would be to disregard substance because of the feeble enticement of the 'civil' label-of-convenience which has been attached to juvenile proceedings." Id.* (emphasis supplied)

The court below relied on such a "label-of-convenience" in disposing of the question of the proper evidentiary

standard. It paid no attention to substance.[30] Other courts have not been so indifferent to the realities of the situation. Thus the Supreme Court of Virginia, in holding the reasonable doubt standard applicable in delinquency proceedings, has said:

> "The judgment against a youth that he is delinquent is a serious reflection upon his character and habits. The stain against him is not removed merely because the statute says no judgment in this particular proceeding shall be deemed a conviction for crime or so considered. The stigma of conviction will reflect upon him for life. It hurts his self-respect. It may, at some inopportune, unfortunate moment rear its ugly head to destroy his opportunity for advancement, and blast his ambition to build up a character and reputation entitling him to the esteem and respect of his fellow man . . . . Guilt should be proven by evidence which leaves no reasonable doubt." *Jones* v. *Commonwealth*, 185 Va. 335, 341-342, 38 S.E.2d 444, 447 (1946).

The Supreme Court of Illinois, where the juvenile court movement in this country began, recently held the rea-

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[30] In *State* v. *Shardell*, 107 Ohio App. 338, 153 N.E.2d 510 (1958), relied on by the court below for the proposition that the civil standard should apply in juvenile proceedings, the court said:

> "It is an informal hearing through the medium of juvenile Court to determine whether the child needs the intervention of the state as guardian and protector of his person. *This is obviously to do away with the usual and customary ceremony and procedure of a court trial in order to surround the child with an atmosphere of friendliness and goodwill rather than one of hostility and fault-finding.*" 107 Ohio App. at 340-341, 153 N.E.2d at 512 (emphasis supplied).

In the light of what has happened to petitioner in this case, such an analysis of the impact of a juvenile delinquency proceeding is totally lacking in realism.

sonable doubt standard applicable in a law violation case, stating:

> "When we eschew legal fictions and adopt a realistic view of the consequences that attach to a determination of delinquency and a commitment to a juvenile detention home, 'juvenile quarters' in a jail or a State institution as described above, we can neither truthfully nor fairly say that such an institution is devoid of penal characteristics. Though the purpose of industrial training schools for boys, such as that at St. Charles in Illinois, is to rehabilitate and train youths whose misconduct has brought them to these institutions, the incarcerated juveniles' liberty of action is restrained just as effectively as that of the adult inmates serving terms in State and Federal prisons". *In re Urbasek,* —— Ill. 2d ——, —— N.E.2d —— (1967).

The requirement of a higher standard of proof when liberty and reputation are jeopardized is long-standing and is generally recognized in our law. Thus McCormick states:

> "The consequences to the life, liberty and good name of the accused from a conviction of crime may be much more serious than the effects of a judgment in a civil case. Accordingly, it is just and reasonable to require a greater degree of confidence by the trier in the truth of the charge in a criminal than in a civil case. This demand for a higher degree of persuasion in criminal cases was recurrently expressed from ancient times . . . ." McCormick, *Evidence,* § 321, p. 681.

As Professor Goldstein has analyzed the concepts of "presumption of innocence" and proof "beyond a reasonable doubt":

> "[they] symbolize today, as they did in their beginning, the special place of the accused in our system of criminal procedure. They cast in evocative language the deeply-held feeling that the combination of all-too-fallible witnesses and serious sanctions requires that the sanctions should be imposed only when guilt seems virtually certain . . . the serious nature of the criminal sanction would seem to be ample reason for insisting upon standards of proof more rigorous than those which prevail in civil cases." Goldstein, *The State and the Accused: Balance of Advantage in Criminal Procedure*, 69 Yale L. J. 1149, 1153, 1162 (1960).

The same recognition of the need to safeguard the adjudicative process when vital personal interests are affected underlies this Court's line of decisions on the standard of proof in denaturalization, expatriation, and deportation cases. Only last Term, this Court held that the burden on the Government in a deportation case is to establish the facts by no less than "clear, unequivocal, and convincing evidence." *Woodby* v. *Immigration Service*, 385 U.S. 276, 286 (1966).[31]

In words precisely applicable to the present case, this Court rejected the Government's contention that because deportation is not criminal, the appropriate burden is the "preponderance" test of civil cases. Mr. Justice Stewart said for the Court:

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[31] This test had previously been applied in denaturalization and expatriation cases. See 385 U.S. at 285 nn. 16 and 17, and cases therein cited.

> *"To be sure, a deportation proceeding is not a criminal proceeding.* [citation omitted] *But it does not syllogistically follow that a person may be banished from this country upon no higher degree of proof than applies in a negligence case."* 385 U.S. at 285. (emphasis supplied)

It also does not syllogistically follow from the label attached to a delinquency proceeding that a juvenile may be incarcerated for up to seven years and subjected to other serious sanctions on "no higher degree of proof than applies in a negligence case."

The trend of authoritative commentary on the juvenile court system has turned decisively against the "preponderance" test.[32] The Children's Bureau of the Department of

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[32] The "preponderance" test has been termed the majority position, Note, *Juvenile Delinquents: The Police, State Courts, and Individualized Justice,* 79 Harv. L. Rev. 775, 795 (1966) (hereinafter cited as "Harvard Law Review Note"). But the courts adopting it have generally relied on the now discredited "'civil' label-of-convenience" to justify it.

Moreover, even in states which have formally adhered to the "preponderance" test, individual juvenile court judges have exercised the power to require a higher standard of proof of delinquency. See Comment, *Criminal Offenders in the Juvenile Court: Some Brickbats and Another Proposal,* 114 U. Pa. L. Rev. 1171, 1194 (1966) (hereinafter cited as "Pennsylvania Law Review Comment"); Rubin & Shaffer, *Constitutional Protections for the Juvenile,* 44 Denver L. J. 66, 70 (1967).

This trend began early in the juvenile court movement:

> "When delinquency cases are heard in non-criminal courts, I suppose the true rule to be preponderance of evidence. But here I, at least, must plead guilty to judicial legislation, and I suspect I am not alone in this. When we have minimized the stigma of an adjudication of delinquency in every way that kindly ingenuity may devise, it remains true that in the mind of the child, his family and his acquaintances who know about it, it is practically equivalent to conviction of a criminal of-

Health, Education, & Welfare rejects it in favor of the adoption of a requirement of "clear and convincing" proof.[33]

The framers of the current proposal for a Uniform Juvenile Court Act, prepared in the light of *Gault*, state:

> "A child should not be deprived of his liberty, nor his parents deprived of his custody, based only on 'a preponderance of the evidence.'" National Conference of Commissioners on Uniform State Laws, Second Tentative Draft, Uniform Juvenile Court Act, p. 34 (1967).

Recently the Supreme Court of New Jersey adopted new rules for the conduct of juvenile delinquency proceedings, providing that an adjudication of delinquency must be based on evidence beyond a reasonable doubt. New Rule 6.9-1(f) relating to juvenile court procedure, effective September 11, 1967.

The Illinois Supreme Court, in holding unconstitutional the Illinois statutory incorporation of the "preponderance" test, stated:

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fense. In the face of this fact legal theory should give way, and no less evidence should be required than if the hearing were a criminal trial. In the rare instances when I have juries in the juvenile court, I instruct them to this effect, and I apply the same test to my own mind in reaching judicial conclusions." Waite, *How Far Can Court Procedure Be Socialized Without Impairing Individual Rights*, 12 J. Crim. L.C. & P.S. 339, 344 (1922).

[33] Children's Bureau, HEW, *Standards for Juvenile and Family Courts*, p. 72 (1966) (hereinafter cited as *"Standards"*). "Clear and convincing proof is the highest order of civil evidence, which admits of only one reasonable conclusion." Vinter, *The Juvenile Court as an Institution, Task Force*, 84, 103 (1967). It will be recalled that the Supreme Court of Arizona in *Gault* adopted this standard of "clear and convincing evidence." See 387 U.S. at 11.

"We need not be reminded that the *Gault* decision did not pass upon the precise question of the quantum of proof that must be shown to validate a finding of delinquency. We believe, however, that the language of that opinion exhibits a spirit that transcends the specific issues there involved, and that, in view thereof, it would not be consonant with due process or equal protection to grant allegedly delinquent juveniles the same procedural rights that protect adults charged with crimes, while depriving these rights of their full efficacy by allowing a finding of delinquency upon a lesser standard of proof than that required to sustain a criminal conviction. Since the same or even greater curtailment of freedom may attach to a finding of delinquency than results from a criminal conviction, we cannot say that it is constitutionally permissible to deprive the minor of the benefit of the standard of proof distilled by centuries of experience as a safeguard for adults." *In re Urbasek, supra,* —— Ill. 2d at ——, —— N.E.2d at ——.

The Illinois court also emphasized that:

"The unique benefits that are derived from the special dispositional processes under the Act will not be diluted by the changes made here at the adjudicatory stage. Moreover, we do not suggest that any infirmity exists in the provisions of the Act relating to dependent and neglected minors because the circumstances of such youths differ substantially from those of delinquent minors whose own culpable acts cause them to be deprived of their parental home and natural liberty in appropriate cases. . . . Because of

> these differences we see no compelling reason for requiring more than a preponderance of the evidence standard of proof in cases of dependency or neglect which may appropriately be labelled 'civil' proceedings both in the legal and lay sense of the word." —— Ill. 2d at ——, —— N.E.2d at ——.

The arbitrariness and unfairness of the "preponderance" test as applied by the court below are heightened by comparing it with the standard of proof for adults accused of crimes in both the adult and juvenile courts of Ohio. Ohio law provides that in the court of common pleas, which tries felonies:

> "A defendant in a criminal action is presumed to be innocent until he is proved guilty of the crime charged, and in case of a reasonable doubt whether his guilt is satisfactorily shown, he shall be acquitted. This presumption of innocence places upon the state the burden of proving him guilty beyond reasonable doubt." [34]

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[34] Ohio Rev. Code Ann. § 2945.04. The statute proceeds to define reasonable doubt as follows:

> " 'It is not a mere possible doubt, because everything relating to human affairs or depending upon moral evidence is open to some possible or imaginary doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction to a moral certainty of the truth of the charge.'
>
> In charging a jury the trial court shall state the meaning of presumption of innocence, and read said definition of reasonable doubt."

This definition is substantially that of Chief Justice Shaw in *Commonwealth* v. *Webster*, 5 Cush. 295, 320 (Mass. 1850).

The presumption of innocence and the requirement of proof beyond a reasonable doubt are also applicable in magistrate's courts trying misdemeanors, violations of ordinances, violations of penal regulations, and complaints to keep the peace. *Id.* § 2938.08.

Likewise, the requirement of proof of each element of the offense beyond a reasonable doubt applies in trials of adults in the juvenile courts. In fact, with respect to the trial of an adult in the juvenile court for the misdemeanor of contributing to the delinquency of a minor, the Supreme Court of Ohio has held that:

> "It is essential, in order to sustain a conviction, to establish by evidence beyond a reasonable doubt that there was some delinquency of such child which defendant either aided, abetted, induced, caused or to which he contributed." *State* v. *Miclau,* 167 Ohio St. 38, 146 N.E.2d 293, 294 (1957).[35]

Moreover, in a variety of civil cases, the courts of Ohio apply a higher standard of proof than the "preponderance" test. For example, it has been held that there is a presumption of the legitimacy of a child which is rebuttable only by "clear and convincing evidence." *State* v. *Carter,* 175 Ohio St. 98, 100, 191 N.E.2d 541, 543 (1963). It is astounding that if the State, or a private party, were attempting to prove that petitioner was illegitimate in a case affecting his property rights, a higher standard of proof would be imposed than in a delinquency proceeding which can take away his liberty and destroy his reputation.[36]

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[35] Thus, paradoxically, if a juvenile and an adult were tried for delinquency and contributing to delinquency respectively, based on the same conduct of the juvenile, the juvenile could be adjudicated a delinquent by a preponderance of the evidence of the alleged delinquent act, whereas the same act would have to be proved beyond a reasonable doubt to convict the adult.

The requirement of proof beyond a reasonable doubt also applies to the trial of an adult in the juvenile court for the misdemeanor of nonsupport. *State* v. *Carter,* 175 Ohio St. 98, 191 N.E.2d 541 (1963).

[36] "Clear and convincing" evidence is also necessary in Ohio to support a gift *causa mortis, Adams* v. *Fleck,* 171 Ohio St. 451, 455,

In the light of these factors, the "preponderance" test, as applied in this case, should be held to be a denial of due process and equal protection.

As the proper test in a law violation case with the serious potential consequences of this one, we believe that proof of the violation beyond a reasonable doubt should be required. At the minimum, the violation should be proved by no less than the "clear, unequivocal, and convincing" evidence which the Government must present in deportation, denaturalization, and expatriation cases. See *Woodby* v. *Immigration Service, supra.*[37]

The "reasonable doubt" standard is supported by the weight of history and of universal usage in the United States. Mr. Justice Frankfurter has said:

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172 N.E.2d 126, 129 (1961); to disprove the authenticity of a signature on a summons in a civil case, *Sjogren* v. *Sjogren,* 77 N.E.2d 739 (Ohio App. 1946); and to prove a commonlaw marriage, *Brastein* v. *Sedivy,* 153 N.E.2d 541 (Ohio Prob. Ct. 1957).

As this Court noted in *Woodby* v. *Immigration Service, supra,* this standard of proof "is no stranger to the civil law; and it, or even a higher one," "has traditionally been imposed in cases involving allegations of civil fraud, and in a variety of other kinds of civil cases involving such issues as adultery, illegitimacy of a child born in wedlock, lost wills, oral contracts to make bequests, and the like." 385 U.S. at 285 and n. 18. See 9 Wigmore, *Evidence,* § 2498 (3d ed. 1940).

[37] We do not regard the latter test as significantly different from the "reasonable doubt" test. The Court in *Schneiderman* v. *United States,* 320 U.S. 118, 135 (1943), a denaturalization case, referred to "'clear, unequivocal, and convincing' evidence *which does not leave the issue in doubt.*" (emphasis supplied) In *Baumgartner* v. *United States,* 322 U.S. 665, 670 (1944), another denaturalization case, the Court formulated the standard as "that solidity of proof *which leaves no troubling doubt* in deciding a question of such gravity. . . ." (emphasis supplied) What matters, we submit, is not so much the precise verbal formula but that the standard of proof shall be substantially higher in a case like this than in an ordinary civil case.

"It is the duty of the Government to establish [an accused's] guilt beyond a reasonable doubt. This notion —basic in our law and rightly one of the boasts of a free society—is a requirement and a safeguard of due process of law in the historic, procedural context of 'due process.'" *Leland* v. *Oregon*, 343 U.S. 790, 802-803 (1952) (dissenting opinion of Frankfurter and Black, JJ.)[38]

The "reasonable doubt" standard is clearly superior to all others in protecting against miscarriages of justice and in helping to assure that no man—or boy—should suffer for an offense he did not commit. It has been said:

"It is well to remember a major point about the legal requirement that for conviction there be proof beyond a reasonable doubt: it is the normative or value judgment expressed in this requirement. It is a way of saying that we live in a society that prefers to let ten guilty men go free rather than risk convicting one innocent man. This is, to be sure, an almost heroic commitment to decency." Kalven & Zeisel, *The American Jury*, p. 189 (1966).

There is no reason why the "commitment to decency" of the juvenile courts should be less than that of adult courts. Or to put the point another way: there are no discernible

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[38] The earliest recorded crystallization of the "reasonable doubt" formulation appears to have been in 1798, in a treason trial in Ireland, but it was already regarded as a settled principle of law. See McCormick, *Evidence*, § 321, pp. 681-682.

"It is now accepted in commonlaw jurisdictions as the measure of persuasion by which the prosecution must convince the trier of all the essential elements of guilt." *Id.* See also 9 Wigmore, *Evidence*, § 2497, pp. 318-320.

institutional interests or distinctive objectives of the juvenile court system which justify a lower standard of proof for a juvenile accused of a law violation than would prevail for an adult accused of the same violation. It cannot be seriously contended that the need to suppress juvenile delinquency is so much greater than the need to suppress adult crime that society can afford to take greater risks with the fact-finding process in juvenile courts than it would in adult trials.

Moreover, the risks of unjust and inaccurate findings of fact are at least as substantial in juvenile as in adult courts because of the practice of many juvenile courts to operate under relaxed rules of evidence. See *In re Gault*, 387 U.S. at 11 n.7. The record in the present case, for example, is spattered with hearsay at several important points. (See, *e.g.*, A. 210-211.) The danger that a lower standard of proof may lead to an unjust adjudication in the juvenile court is not illusory. The District Court of Appeals conceded the reality of the spectre in this very case when it stated:

> *"The evidence contained in the record fails to disclose any thorough investigation by officials toward eliminating the possibility that Mrs. Gladys Willard may have been killed by some other person."* (A. 271.) (emphasis supplied)

This statement by the court below—which was obviously considered with care—points up another office of the "reasonable doubt" standard. It makes the investigating authorities do their job and prepare their case properly. There is surely no institutional reason why sloppiness and negligence in the preparation and presentation of a law

violation case are tolerable in the juvenile court system but not in the adult courts. If a law enforcement official knows that he must meet the higher standard of proof, he must be more efficient in seeking out evidence and establishing guilt. All innocent persons are thereby rendered more secure.[38a]

Furthermore, the "reasonable doubt" standard is superior to all others in bringing home forcefully to the trier of fact, whether court or jury, that it must reach a state of belief as to where the truth lies; the "preponderance" test is especially dangerous in its tendency to lead the trier of fact into a merely abstract weighing of the quantity of evidence produced by each side, without regard to its actual probative effect in convincing him of the truth of disputed facts. As McCormick puts this point:

> "It will be noted that the 'reasonable doubt' formula points to what we are really concerned with, the state of the jury's mind, whereas the other two ['clear, strong and convincing' and 'preponderance'] divert attention to the evidence, which is a step removed, being the instrument by which the jury's mind is influenced. These latter phrases, consequently, are awkward vehicles for expressing the degree of the jury's belief." McCormick, *Evidence*, § 319, p. 676.[39]

[38a] This would work no hardship on law enforcement officials in a serious law violation case involving a juvenile. Since certification of the juvenile for trial as an adult is always a possibility in such a case, elementary prudence should lead the authorities to investigate and prepare such cases on the assumption that they must meet the "reasonable doubt" standard of proof anyway. See Children's Bureau, HEW, *Police Work with Children*, p. 37 (1962).

[39] See also James, *Civil Procedure*, § 7.6, pp. 250-251. It has been pointed out that the "reasonable doubt" standard has the further advantage of being a term in common use, readily under-

Finally, the "reasonable doubt" standard is also readily separable from other trial procedures. If such noncriminal features as more relaxed rules of evidence and trial by the court rather than a jury are retained by juvenile courts, the application of a stricter standard of proof is in no way inconsistent with them. Indeed, if such features are constitutionally permissible, they make all the more urgent a strict standard of proof to guard against injustice.[40]

If we are correct that the courts below applied constitutionally impermissible standards of proof, we contend that under a permissible standard—whether "reasonable doubt" or some substantially equivalent formulation—the evidence against petitioner is constitutionally insufficient to uphold the judgment below. That this Court is empowered to make its own evaluation of the record and arrive at such a determination is established by *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 264-265, 285 (1964), in which the Court said:

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stood by jurors, lawyers, and judges alike. McCormick, *Evidence*, § 321, p. 682. The "preponderance" test is considered one of the most widely misunderstood and difficult to explain in the law of evidence. See McBaine, *Burden of Proof: Degrees of Belief*, 32 Calif. L. Rev. 242, 251 (1944).

[40] For other authorities urging the "reasonable doubt" test in delinquency cases, see Goldberg & Sheridan, *Family Courts—An Urgent Need*, Children's Bureau, HEW, Publication No. 6-1960, pp. 12-13; Pennsylvania Law Review Comment, p. 1195; Antieau, *Constitutional Rights in Juvenile Courts*, 46 Cornell L. Q. 387, 412 (1961); Rappeport, *Determination of Delinquency in the Juvenile Court: A Suggested Approach*, 1958 Wash. U. L. Q. 123, 149-156; Boches, *Juvenile Justice in California: A Re-evaluation*, 19 Hastings L. J. 47, 92 (1967); Rubin, *Constitutional Rights in Juvenile Court*, 16 Clev.-Mar. L. Rev. 477, 483 (1967).

The practice in the children's courts of England is to require the criminal standard of proof. Fitzgerald, *Child, White Paper and Criminal Law*, 1966 Crim. L. Rev. 607, 611.

> "We further hold that under the proper safeguards the evidence presented in this case is constitutionally insufficient to support the judgment for respondent."
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> • • • • •
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> "This Court's duty is not limited to the elaboration of constitutional principles; we must also in proper cases review the evidence to make certain that those principles have been constitutionally applied." [41]

Actually, detailed analysis of the record is hardly necessary in view of the statement by the District Court of Appeals that:

> "The evidence contained in the record fails to disclose any thorough investigation by officials toward eliminating the possibility that Mrs. Gladys Willard may have been killed by some other person." (A. 271.)

It is clear from this statement that the State did not prove beyond a reasonable doubt or by clear, unequivocal, and convincing evidence that petitioner murdered Mrs. Willard. The court below affirmed the judgment only by applying the bare "preponderance" test of the civil law; even then it found only that the judgment was not "against the manifest weight of the evidence." (A. 271.)

The case against petitioner was full of holes. All that the State really had to rely on was the discovery of the body under his bed—but without any showing that he had exclusive control of the premises or was home throughout

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[41] See also *Beckley Newspapers Corp.* v. *Hanks*, No. 467, O.T. 1967, *cert. granted and judgment reversed per curiam*, Nov. 6, 1967, 36 U.S.L.W. 3188; *Baumgartner* v. *United States*, 322 U.S. 665, 671 (1944); *Mortensen* v. *United States*, 322 U.S. 369, 374 (1944).

the time when the body could have been placed there. The time of Mrs. Willard's death, the place of her death, petitioner's whereabouts during the day, her whereabouts during the day—all were left uncertain.[42] Petitioner had no motive to kill her, betrayed no consciousness of guilt, and was shown to be of high moral character and reputation. A prime suspect—her husband—emerged clearly from the record. He had both the motive and the opportunity to commit the murder. He even went so far as to admit on cross-examination his presence near the scene at about the time the State sought to show that Mrs. Willard had died.

On this evidence, no one could conclude that petitioner's commission of the murder was proved with any degree of clarity or certainty, much less beyond a reasonable doubt. To adjudge a person—man or boy—a murderer on this evidence is a denial of due process of law. *Cf. Thompson* v. *City of Louisville*, 362 U.S. 199 (1960).[43]

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[42] Petitioner's statements to the officials who interrogated him—even if they were admissible, which we deny—were not reduced to writing; were ambiguous and unclear as to his and Mrs. Willard's whereabouts during the day; at most showed that he saw Mrs. Willard on the day she died, as did a number of other people; and did not establish either that he must have been the last person to see her alive or that he must have been in the house when her body was placed under his bed. Chief Phillips' hearsay testimony about the investigation he conducted and the people he talked to was lacking in probative value, and the definitive evaluation of his investigation has already been given by the District Court of Appeals in the passage we have quoted.

[43] The appropriate disposition of this case in the state court on reversal and remand should therefore be a final judgment for petitioner.

II.

Petitioner Was Denied Due Process and Equal Protection Because He Was Not Afforded a Fair Trial by an Impartial Trier of Fact.

A. The record establishes that the trier of fact, the juvenile court judge, participated—personally and through his official arm, the probation officer—in the investigative and accusatory process in this case and that he had *ex parte* access to the facts prior to the adjudicative stage. Either of these factors is sufficient to invalidate his judgment under familiar principles of law.

A fair trial by an impartial trier of fact is one of the essential elements of due process of law in any case, criminal or civil, in any court, state or federal. This Court expressed the governing principles in *In re Murchison*, 349 U.S. 133, 136 (1955), in this fashion:

> "A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness. To this end no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome. That interest cannot be defined with precision. Circumstances and relationships must be considered. This Court has said, however, that 'every procedure which would offer a possible temptation to the average man as a judge . . . not to hold the balance nice, clear and true between the State and the accused, denies the latter due process of law.' [Citation omitted]. Such a

and ordering petitioner's arrest, the court found at the conclusion of the hearing that there was "probable cause to believe that this young defendant may have done this act." (A. 240.) The court was simply reaffirming the judgment which it must have reached in advance of the hearing in order to issue the warrant for petitioner's arrest.

Moreover, the relationship between the court and its probation officer, as provided for by the Ohio juvenile code and as exhibited in this record, is inherently prejudicial to fair and impartial judgment by the court. The Ohio code mandates that the probation department:

> "shall make such investigations as the juvenile court directs, keep a written record of such investigation, and submit the same to the judge or deal with them as he directs." Ohio Rev. Code Ann. § 2151.14.

Here the court's probation officer investigated the crime; joined in the interrogation of petitioner and accused him of committing the murder; told the Prosecuting Attorney that he felt that petitioner had participated in the crime; joined with the Prosecuting Attorney and the police chief in the decision to file a complaint against petitioner; was directed by the judge to arrest petitioner;[45] and then testified against him at the adjudicative hearing before the same judge.

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[45] A probation officer in Ohio is authorized to serve process, make arrests, detain arrested persons, "and perform such other duties, incident to his office, as the judge directs." Ohio Rev. Code Ann. § 2151.14.

He is appointed by the juvenile court judge, his compensation is fixed by the judge, and he serves at the judge's pleasure. *Id.* § 2151.13.

This placed the juvenile court in the position of actively participating through its own official arm in the investigative and accusatory phase of these proceedings and then sitting in judgment on what its official arm had done, even to the point of passing on the credibility of its probation officer as a witness.

Authoritative commentators have warned against this mingling of functions which should be kept separate for the sake of fair adjudication. The Children's Bureau states:

> "It seems clear that investigation, as defined here, and the initiating of a petition are not appropriate functions of the court. *A court through the use of its own staff should not be placed in the position of investigator and petitioner and also act as the tribunal deciding the validity of the allegations in the petition. . . .*" *Standards*, p. 13. (emphasis supplied).[46]

The proposed Uniform Juvenile Court Act provides:

> "the judge . . . if he approves the filing of the petition shall not hear or dispose of matters thereafter arising in the case." National Conference of Commissioners

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[46] The kind of activity by the probation officer shown in this record is not consistent with the proper attainment by the juvenile court of its rehabilitative purposes:

> "placing responsibility on the probation officer for investigating the act, filing the petition, and supporting the petition with the necessary evidence in court may in fact place him in an adversary position in the eyes of the child and family. The doubt and distrust thereby aroused in the minds of the child and parents hinders the development of the helping relationship which must be established if treatment is to be effective. . . . The functions of the law enforcement officer and those of the probation officer are incompatible when vested in the same individual." *Standards*, pp. 55, 107.

on Uniform State Laws, Second Tentative Draft, Uniform Juvenile Court Act, Section 14, pp. 18-19 (1967).

Its framers state that judicial approval of the filing of a petition "is open to serious objection for it puts the judge in the untenable position of hearing a charge which he has approved," citing *Murchison*. *Id.*, Comment to Section 14, p. 19. See also Boches, *Juvenile Justice in California: A Re-evaluation*, 19 Hastings L. J. 47, 67, 94 (1967).

The juvenile court's *ex parte* access to the investigation of the crime in advance of adjudication is an additional reason why the proceedings below denied petitioner his right to a fair and impartial trial. This Court has held that the trier of fact must not be afforded *ex parte* access to facts about the case. *Parker* v. *Gladden*, 385 U.S. 363 (1966).

As was said in *Turner* v. *Louisiana*, 379 U.S. 466, 472-473 (1965):

> "the 'evidence developed' against a defendant shall come from the witness stand in a public courtroom where there is full judicial protection of the defendant's right of confrontation, of cross-examination, and of counsel."

This Court held in *Kent* v. *United States*, 383 U.S. 541, 563 (1966), that a juvenile court judge "*may not*, for purposes of a decision on waiver, *receive or rely upon secret information, whether emanating from his staff or otherwise.*" (emphasis supplied) Juvenile courts are "governed in this respect by established principles controlling courts and quasi-judicial agencies." *Id.*

It follows that, in an adjudicative hearing to determine delinquency, the juvenile court judge may not receive or rely on information communicated *ex parte,* by his probation officer or anyone else. It is clear from this record that information about this case was communicated to the court by the probation officer in advance of adjudicative hearing. The only point left uncertain is the extent and detail of the information communicated. In view of the juvenile court's foreclosure of further inquiry into the extent of this *ex parte* communication (see A. 122-123), any uncertainty on this point should not operate to petitioner's detriment: "the ordinary rule, based on considerations of fairness, does not place the burden on a litigant of establishing facts peculiarly within the knowledge of his adversary." *Campbell* v. *United States,* 365 U.S. 85, 96 (1961).[47]

Many authorities in the juvenile court field have emphasized the threat to fair adjudication posed by *ex parte* access to facts about the case by the trier of fact in advance of adjudication. See, *e.g., Standards,* p. 73; *Task Force,* p. 35; Vinter, *supra, Task Force,* p. 88; Note, *Rights and Rehabilitation in the Juvenile Courts,* 67 Col. L. Rev. 281, 308 (1967) (hereinafter cited as "Columbia Law Review Note").

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[47] In *Commonwealth* v. *Johnson,* 348 Penn. 349, 35 A.2d 312 (1944), the Court reversed a murder conviction entered in a non-jury trial because the court communicated with officials of the penitentiary where the defendant was confined before returning the verdict. The Court said:

> "We are reversing the judgment because the record does not show affirmatively that no *ex parte* evidence was received by the court before it determined and declared the degree of the defendant's guilt. . . . " 348 Penn. at 353, 35 A.2d at 314.

Such *ex parte* access in advance of adjudication, in addition to denying the juvenile's rights of confrontation, cross-examination, and the assistance of counsel, all recognized in *Gault*, greatly increases the dangers of prejudgment by the trier of fact. These dangers were at their maximum here because of the role of the juvenile court judge and his probation officer in the investigatory and accusatory phases. As was said in *In re Murchison, supra*, "As a practical matter it is difficult if not impossible for a judge to free himself from the influence of what took place in his 'grand-jury' secret session." 349 U.S. at 138.[48]

The foregoing considerations require reversal of the judgment against petitioner.

B. The court below also addressed itself to the right of jury trial in juvenile cases and held that the Ohio juvenile code validly denies jury trial to alleged delinquents, on the ground that "the Fifth and Sixth Amendments to the United States Constitution, being applicable only to the rights of accused persons charged with criminal offenses, do not apply." (A. 268.)

We contend that petitioner had a constitutional right to a trial by an independent and impartial trier of fact—a jury if he so desired—of the issue whether he murdered

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[48] The court's predisposition to find guilt is further shown by its denial of pre-hearing release to petitioner in the face of an overwhelming record in support of the motion for release, as we discuss in Point IV, *infra*.

If more evidence of prejudgment in this case is needed, we need only point to repeated manifestations of hostility by the judge to the defense, such as his suggestion that motions challenging the proceedings on constitutional grounds were "delaying tactics" (A. 115); his statement in response to a defense proffer at one point that "You can proffer the City Hall, but it's incompetent" (A. 180); and other comments by the court. (A. 106-108, 112-113.)

Mrs. Willard. The Ohio juvenile code, providing that "the court shall hear and determine all cases of children without a jury,"[49] cannot constitutionally be applied to deny jury trial in a serious law violation case like the present.

The history of trial by jury in Anglo-American law; its central position in our system of criminal procedure; and the deeply held postulates of our society about the guilt-determining process expressed in trial by jury, are all too familiar to this Court to require elaborate treatment here.[50] We will address ourselves to the specific application of the jury trial right to juvenile proceedings, contending that the considerations justifying it in adult cases are at least as compelling in juvenile delinquency cases based on serious law violation charges and that its recognition in such cases would in no way impair the performance by the juvenile courts of their proper function.

First, it should be pointed out that the court below, in holding jury trial inapplicable, relied on the same "'civil' label-of-convenience" that it did with respect to the standard of proof. That formula for determining procedural issues in juvenile cases was discredited in *Gault*, as was also the sweeping conclusion of the court below that the Fifth and Sixth Amendments to the Federal Constitution do not apply in juvenile courts: *Gault* held rights guaranteed in both Amendments to be applicable in a delinquency proceeding under the Fourteenth Amendment. Thus

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[49] Ohio Rev. Code Ann. § 2151.35.

[50] For an exhaustive consideration of trial by jury, establishing that it is "so fundamental and essential to a fair trial that it is incorporated in the Due Process Clause of the Fourteenth Amendment", *Washington* v. *Texas*, 388 U.S. 14, 17-18 (1967), we respectfully refer this Court to the Brief for Appellant in *Duncan* v. *State of Louisiana*, No. 410, O.T. 1967.

the question of jury trial cannot be resolved on so simplistic a basis.

The right of jury trial, like the rights held applicable in *Gault,* must be evaluated in light of the realities of the juvenile court system, the substance of the issues being adjudicated in the delinquency proceeding, and the potential consequences of a delinquency adjudication. This Court's statement in *District of Columbia* v. *Clawans,* 300 U.S. 617, 627 (1937), is pertinent in this respect:

> "We are aware that those standards of action and of policy which find expression in the common and statute law may vary from generation to generation. Such change has led to the abandonment of the lash and the stocks, and we may assume, for present purposes, that commonly accepted views of the severity of punishment by imprisonment may become so modified that a penalty once thought to be mild may come to be regarded as so harsh as to call for the jury trial, which the Constitution prescribes, in some cases which were triable without a jury when the Constitution was adopted."

A jury is a superior trier of fact in a law violation case like the present one. The adjudicative hearing was simply a trial of the issue: did petitioner murder Mrs. Willard? Every state in the Union would have given petitioner a right of jury trial in such a case if he had been an adult. See *Turner* v. *Louisiana,* 379 U.S. 466, 471 n. 9 (1965). It presented a classic jury issue, literally a "who-dun-it," the very kind of case of which Chief Justice Cooley wrote:

> "The law has established this tribunal because it believed that, from its numbers, the mode of their

> selection, and the fact that the jurors came from all classes of society, *they are better calculated to judge motives* [*and*] *weigh possibilities . . . than any single man; however pure, wise and eminent he may be.* This is the theory of the law; and as applied to criminal accusations, it is eminently wise and favorable alike to liberty and justice." *People* v. *Garbutt,* 17 Mich. 9, 27 (1868). (emphasis supplied)

Nothing in the trial of this case called for the application of any special expertness in determining delinquency possessed by the juvenile court judge.[51] There was no issue requiring the making of a judgment or application of a standard peculiar to the juvenile court system, such as "incorrigibility" or "habitual truancy," in which a juvenile court judge might bring special knowledge or familiarity to the adjudicative phase. Empirical studies have failed to demonstrate that judges have any special competence denied to jurors in finding the facts as to alleged law violations. Instead they have reinforced the views of practicing trial lawyers that the jury is a reliable fact-finding body. See, *e.g., Kalven & Zeisel, supra,* pp. 149-162.

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[51] If juvenile court judges can be presumed to have special knowledge or expertness, it would not be in the adjudicative stage, but in the determination of how best to treat an adjudicated delinquent in the dispositional stage. See Pennsylvania Law Review Comment, pp. 1218-19.

Compare this Court's comment in *Gault,* 387 U.S. at 14 n. 14, that as of 1964, less than 10% of juvenile court judges were full-time; a fifth were not members of the bar; a quarter had no law school training; and three-quarters devoted less than a quarter of their time to juvenile matters. "It has been observed that while 'good will, compassion, and similar virtues are . . . admirably prevalent throughout the system . . . expertise, the keystone of the whole venture, is lacking.'" *Id.* (Citing Harvard Law Review Note, p. 809.)

The superiority of jury trial purely from the standpoint of fact-finding is reinforced if a higher standard of proof is to be required in juvenile cases, as we contend in Point I. The jury is constituted as a deliberative body. If the proof of a law violation must be beyond a reasonable doubt, or at least by "clear, unequivocal, and convincing evidence," the deliberative process of the jury is a better means of assuring that the proper standard is adhered to. There is always the danger that a single judge will apply the higher standard in form, but a lesser in actuality. Moreover, without the need to instruct a jury on the law and formulate the relevant factual issues for their determination, it may be impossible in a trial by the court to know how the judge reached his decision, and whether he applied correct legal rules or even formulated the correct factual issues for decision.

It has been said, on the basis of empirical study, that:

> "the jury, as an expression of the community's conscience, interprets this norm [proof beyond a reasonable doubt] more generously and more intensely than does the judge. If a society wishes to be serious about convicting only when the state has been put to proof beyond a reasonable doubt, it would be well advised to have a jury system." *Kalven & Zeisel, supra,* pp. 189-190.

The other well-known values of the jury system also apply at least as forcefully to juvenile courts as to adult trials. As this record, like those in *Kent* and *Gault*, makes clear, the dangers of official arbitrariness in the juvenile court system are real. The jury system is the primary safeguard against such arbitrariness, an antidote to the pre-

judgments and predispositions that any single individual may have, no matter how well-intentioned.

It is also a guarantee that each case will receive the individualized attention it deserves, and not become just another item on an overworked judge's calendar. Trial by jury assures that each issue will receive fresh consideration, without the influence that past cases presenting similar issues may have, even unconsciously, on the mind of a judge as trier of fact. And it assures that the credibility of each witness will be evaluated in each case, without regard to how often he may have appeared before the court in the past or how well known he may be to the judge. This is a particularly important consideration in juvenile cases like the present, where the probation officer, who works under the direction of the judge, also appears as a witness to support the case against the juvenile. See Pennsylvania Law Review Comment, pp. 1186-88.

The jury is thus a unique sentinel against the summary administration of justice. Can it be believed that a jury drawn from among petitioner's neighbors, teachers, and the other people of the village of Baltimore who testified at the hearing on his pre-trial release, would have convicted him on the evidence in this case after only ten minutes of deliberation? Yet that was all the time it took the juvenile court judge to reflect on the evidence and then overrule the motion to dismiss the proceedings for failure of proof.[52]

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[52] An adult felony defendant in Ohio who waives jury trial may request a trial before three judges. Ohio Rev. Code Ann. § 2945.07. But the juvenile's fate turns on the determination of a single man, without any alternative fact-finding procedure to assure due deliberation.

believe he is at least entitled to a fact-finding process which measures up to the essentials of due process and fair treatment.'" ——N.M. at ——, —— P.2d at ——. (Quoting from *In the Interests of Carlo,* 48 N.J. 224, 225 A.2d 110, 116 (1966).[54]

Jury trial is no stranger in the juvenile courts of Ohio. Although it is denied to juveniles, an adult tried for an offense in the juvenile court is entitled to trial by jury. Ohio Rev. Code Ann. § 2151.47. This is in accord with the strong Ohio public policy in favor of trial by jury, as manifested in the State constitutional provision that:

> "In any trial, in any court, the party accused shall be allowed . . . a speedy public trial by an impartial jury of the county in which the offense is alleged to have been committed . . . ." Art. I, § 10.[55]

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[54] See Gardner, *The Kent Case and the Juvenile Court: A Challenge to Lawyers,* 52 A.B.A.J. 923, 924 (1966):

> "When the jurisdiction of a court is being invoked for a criminal offense, basic constitutional rights should be available to all—adults or juveniles. When the charge is the commission of a crime, rights should be identical, be the accused 16 or 60."
>
> "On this point, there is an interesting historical footnote in the great debates on the Fugitive Slave Law. One of the main criticisms of that Law was not slavery per se, the existence of which the Constitution recognized, but the fact that under it the alleged fugitive Negro was denied the right to bail and to a jury trial. Are our children entitled to less? Was the Constitution written only for adults?"

[55] By statute it is further provided that:

> "At any trial, in any court, for the violation of any statute of this state, or of any ordinance of any municipal corporation, except in cases in which the penalty involved does not exceed a fine of fifty dollars, the accused has the right to be tried by a jury." Ohio Rev. Code Ann. § 2945.17.

It cannot be contended that jury trial in the adjudicative phase would interfere with the rehabilitative purposes and processes of juvenile courts. Until it has been adjudicated that he is delinquent by reason of having committed the act charged, there is no basis for assuming that he needs treatment or rehabilitation. See Harvard Law Review Note, p. 794; Pennsylvania Law Review Comment, p. 1217.

Nor can it fairly be said that the jury would inject undue "formality" into a juvenile court hearing and can constitutionally be denied for that reason alone.[56] To justify denial of jury trial in juvenile cases on this ground is simply to confuse the familiar with the necessary. It elevates judicial convenience and time-saving to a higher priority than just determination of guilt. It assumes that trial by jury is a matter of "form"—like a judge's robe or gavel—which may be dispensed with without effect on the guilt-determining process.

But the jury is the mode of trial which was evolved by our system of justice precisely because it was deemed to provide the maximum safeguards for an accused person in the determination of his guilt. Any atmosphere of formality or solemnity thereby introduced into juvenile proceedings is entirely appropriate to the adjudication whether a juvenile has committed murder. A juvenile denied a jury trial and convicted by a judge on evidence like that in the present case is unlikely to believe that he has been the beneficiary of "informal" procedures designed to help establish a therapeutic relationship between him and the judge. As this Court said in *Gault*:

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[56] This is the most frequent objection to jury trial in juvenile cases. See *Standards*, p. 73; *Commonwealth* v. *Johnson*, 234 A.2d 9 (Penn. Super. Ct. 1967).

> "the appearance as well as the actuality of fairness, impartiality and orderliness—in short, the essentials of due process may be a more impressive and more therapeutic attitude so far as the juvenile is concerned." 387 U.S. at 26.

Nor is there any substance to the contention sometimes advanced that a jury trial would represent an intrusion of the public into the confidentiality and secrecy of juvenile proceedings.[57] As this Court recognized in *Gault*, this "claim of secrecy, however, is more rhetoric than reality" and "[e]ven the privacy of the juvenile hearing itself is not always adequately protected." 387 U.S. at 24 and 25 n. 35. As the present case illustrates, knowledge of the commission of a serious crime and the arrest of a juvenile alleged to have committed it is likely to be widespread, especially in a small community. Petitioner received none of the purported benefits of confidentiality from the fact that he was tried by a judge in the privacy of a juvenile courtroom instead of by a jury drawn from among the people of his community.

In any event, a jury trial would not be forced on an unwilling juvenile. If the juvenile would in fact benefit from the more "informal" setting of a nonjury trial, or does not want members of the public present even to the limited extent of having a jury, he and his lawyer ought to be competent to make that judgment and can waive a jury. There is no reason to assume that allowance of the jury trial right

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[57] See, *e.g.*, opinion of Justice Noble, dissenting in *Peyton* v. *Nord*, *supra*, —— N.M. at ——, —— P.2d at ——, 36 U.S.L.W. 2262.

would suddenly deluge the juvenile courts with an unmanageable load of jury trials.[58]

We simply urge that, in a serious law violation case like the present, the juvenile must be granted a jury trial if he wants it.[59] This Court has said that trial by jury is "the most priceless" safeguard for the preservation of "individual liberty and of the dignity and worth of every man." *Irvin* v. *Dowd*, 366 U.S. 717, 721 (1961). It should require more than labels and rhetoric to justify its denial to juvenile defendants.

Certainly, under the circumstances of this case, in which petitioner could not receive a fair and impartial trial from the juvenile court judge, due process requires trial by jury.

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[58] In the District of Columbia, there were three jury trials in juvenile delinquency cases in a two-year period from 1964 to 1966. Report of the President's Commission on Crime in the District of Columbia, pp. 647, 1010 n. 41 (1966); see also Harvard Law Review Note, pp. 793-794.

[59] The Canadian Department of Justice's Committee on Juvenile Delinquency has urged that juveniles should be able to avail themselves of adult criminal procedures, including jury trial, without being subjected to adult criminal penalties. *Juvenile Delinquency in Canada*, p. 82 (1965).

Under our analysis, it follows that not every law violation charge, no matter how petty, requires a jury trial. So-called "petty offenses" have not been tried by juries as of right under the Sixth Amendment and would not have to be in juvenile courts. See *Shick* v. *United States*, 195 U.S. 65 (1904); Frankfurter & Corcoran, *Petty Federal Offenses and the Constitutional Guaranty of Trial by Jury*, 39 Harv. L. Rev. 917, 980 (1926). Nor would the jury trial right necessarily apply to delinquency charges such as "incorrigibility" or "truancy," or other categories of juvenile court jurisdiction which do not involve charges of crime triable by jury as of right in adult cases. See *In re Lambert, supra; In re Elmore*, 222 A.2d 255 (D.C. Ct. Apps. 1966).

III.

The Juvenile Court Denied Petitioner Due Process by Admitting Into Evidence Statements Obtained in Violation of His Privilege Against Self-Incrimination and His Right to Counsel.

The admission of petitioner's statements to law enforcement officials on the night of the discovery of Mrs. Willard's body contravened the principles laid down by this Court in *Miranda* v. *Arizona*, 384 U.S. 436 (1966).

The applicability of *Miranda* to official interrogation of juveniles suspected or accused of serious law violations can scarcely be in doubt after this Court's decision in *Gault*. *Gault* held that "the constitutional privilege against self-incrimination is applicable in the case of juveniles as it is with respect to adults." 387 U.S. at 55. The Court relied in support on this conclusion on *Miranda* and a number of leading cases in this Court and state courts involving pre-trial interrogation of juveniles. The rationale of *Gault* on this point was plainly not limited to testimonial compulsion of the juvenile at the adjudicative hearing, but extends to pre-hearing interrogation as well.

Moreover, this Court stated that:

> "The participation of counsel will, of course, assist *the police,* juvenile courts, and appellate tribunals *in administering the privilege.*" 387 U.S. at 55. (emphasis supplied)

Like the present case, *Gault* involved certain purported "admissions" of a juvenile, which were obtained by a juvenile court probation officer "without counsel and without

advising him of his right to silence, as far as appears." The "admissions" were not reduced to writing. This Court concluded:

> "to say the least, *the process by which the admissions were obtained and received must be characterized as lacking the certainty and order which are required of proceedings of such formidable consequences.*" 387 U.S. at 56. (emphasis supplied)

This Court's consideration of juvenile confessions in *Gault* leads to the conclusion that the *Miranda* guarantees must apply to official interrogation of juveniles suspected or accused of serious law violations, in order to safeguard the privilege against self-incrimination. *Gault* is permeated with distrust of the statements of juveniles extracted through interrogation. The Court said:

> "This Court has emphasized that admissions and confessions of juveniles require special caution . . . . Evidence is accumulating that confessions by juveniles do not aid in 'individualized treatment' . . . and that compelling the child to answer questions, *without warning or advice as to his right to remain silent,* does not serve this or any other good purpose . . . . Further, authoritative opinion has cast formidable doubt upon the reliability and trustworthiness of 'confessions' by children." 387 U.S. at 45, 51, 52. (emphasis supplied)

The need for the *Miranda* safeguards to protect juveniles is far greater than for adults because age and immaturity make it unlikely that a juvenile, particularly one as young as petitioner, will either know his constitutional rights or know how to assert them effectively. As the Court said in *Gallegos* v. *Colorado,* 370 U.S. 49, 54 (1962):

> "a 14-year old boy, no matter how sophisticated, is unlikely to have any conception of what will confront him when he is made accessible only to the police. That is to say, we deal with a person who is not equal to the police in knowledge and understanding of the consequences of the questions and answers being recorded and who is unable to know how to protect his own interests or how to get the benefits of his constitutional rights."

See also *Haley* v. *Ohio*, 332 U.S. 596 (1948); *In the Matter of Four Youths*, Nos. 28-776-J, 28-778-J, 28-783-J, 28-859-J, Juvenile Court of the District of Columbia, April 7, 1961, opinion of Judge Ketcham, cited in *Gault*, 387 U.S. at 54-55; *United States* v. *Glover*, 372 F.2d 43 (2d Cir. 1967).

"[T]he relative ease with which [juveniles] may be induced to make confessions if they are interrogated with a moderate amount of skill" is recognized by experts in interrogation. O'Hara, *Fundamentals of Criminal Investigation*, p. 112 (1956). When there are added the extraordinary arrest, detention, and interrogation powers over juveniles provided by the laws of many jurisdictions, see *In re Gault*, 387 U.S. at 14,[60] the case for applying the *Miranda* safeguards is even more compelling.

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[60] For example, it has been held in Ohio cases that the common law of arrest does not limit the power to take juveniles into custody, *In re L.* ——, 194 N.E.2d 797 (Juv. Ct. Cuyahoga Cy. 1963); that although arrested children are to be "taken directly" before the juvenile court, Ohio Rev. Code Ann. § 2151.25, an arrested juvenile may be interrogated before taking him to the juvenile court, *State* v. *Stewart*, 120 Ohio App. 199, 205, 201 N.E.2d 793, 798 (1963), *aff'd*, 176 Ohio St. 156, 198 N.E.2d 439 (1964), *cert. denied*, 379 U.S. 947; and that delay in taking an accused minor before the court does not require exclusion of his statements obtained in the interim, *State* v. *Lowder*, 79 Ohio App. 237, 72 N.E.2d 785 (1946), *appeal dismissed*, 147 Ohio St. 530, 72 N.E.2d 102 (1947).

Juveniles should have at least the same rights in this regard as members of the military, who are also subject to a historically separate system of law but have been held entitled to receive the *Miranda* warnings at military interrogation. The Court of Military Appeals stated:

> "The time is long since past . . . when this court will lend an attentive ear to the argument that members of the armed services are, by reason of their status, ipso facto deprived of all protections of the Bill of Rights. Both the Supreme Court and this court are satisfied as to the application of constitutional safeguards to military trials, except insofar as they are made inapplicable either expressly or by necessary implication." *United States* v. *Tempia,* 16 U.S.C.M.A. 629, 37 C.M.R. 249 (1956).

The principal authorities in the field concur on the need to give juveniles these safeguards, especially when, as in the present case, certification of the juvenile for trial as an adult on a serious criminal charge is a possibility. The Children's Bureau states:

> "Because of the child's presumed immaturity, special safeguards should be used during a police officer's interview with a child in investigating a delinquent act. In certain situations, depending on the age of the child and the act committed, waiver to criminal court may be a possibility. Moreover, at the time of the interview, it is not known whether the court specializing in children's cases will retain jurisdiction over the case if a petition is filed, or will waive its jurisdiction and permit the child to be tried in a criminal court. Therefore, *it cannot be always assumed that the police*

interview will lead only to a noncriminal proceeding. Therefore, in such situations all of the procedural safeguards in the criminal law should be followed.

Whether or not transfer to the criminal court is a possibility, certain procedures should always be followed. Before being interviewed, the child and his parents should be informed of his right to have legal counsel present and to refuse to answer questions or be fingerprinted if he should so decide. Since it has been held that an adult has a right to counsel at this point, there is every reason to believe that at least the same protection should apply to children. In cases where waiver is possible, he should be also cautioned that if he answers, his answers may be used not only before the specialized court but possibly in a criminal court." *Standards,* p. 49. (emphasis supplied)[61]

California, acting in the aftermath of *Gault,* has recently amended its juvenile court code to require that police and juvenile court probation officers must give the *Miranda* warnings to juveniles before interrogating them. Calif. Welf. & Inst'ns Code §§ 625, 627.5.

No serious obstacle either to effective law enforcement or to the functioning of the juvenile courts is created by the application of the *Miranda* guarantees to juveniles. The number of juveniles involved in the kinds of serious

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[61] See also Note, *The Supreme Court, 1966 Term,* 81 Harv. L. Rev. 69, 174 (1967); Comment, *Miranda Guarantees in the California Juvenile Court,* 7 Santa Clara Lawyer 114 (1966); Columbia Law Review Note, p. 333; Note, 46 Minn. L. Rev. 967, 973-974 (1962); Pennsylvania Law Review Comment, p. 1184; Altman, *The Effect of the Miranda Case on Confessions in the Juvenile Court,* 5 American Criminal Law Quarterly 79 (1967); Rubin & Shaffer, *supra,* 44 Denver L. Rev. at 76-77, 86.

law violations in which police interrogation may be indispensable for solution of the crime is only a fraction of the total of juvenile cases. See Paulsen, *Kent* v. *United States: The Constitutional Context of Juvenile Cases*, 1966 Supreme Court Review, 167, 190-191.[62]

The multitude of police and juvenile court staff contacts with juveniles which do not involve the investigation of serious crimes possibly leading to delinquency charges would not be altered or circumscribed by these procedures. And if unhampered interrogation of juveniles—without any hindrance from the privilege against self-incrimination and the presence of counsel—is considered a *desideratum* of the juvenile court system on the theory that confession is good for the juvenile soul, a simple solution to the problem is available: immunize the juvenile against the use of his statements, and other evidence obtained therefrom, either in a delinquency proceeding or in an adult trial in the event of certification. This would enable officials to interrogate without the *Miranda* warnings by removing any possibility of incrimination of the juvenile from his statements.[63]

On the assumption, then, that *Miranda* governs juvenile interrogations in serious law violation cases, we submit

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[62] Statistics of the National Crime Commission indicate that in 1965 only 8.4% of persons arrested for willful homicide were under 18. *National Crime Commission*, p. 56.

[63] This is essentially the solution devised by New York and Illinois with respect to statements made at preliminary conferences; such statements may not be admitted at an adjudicative hearing. New York Family Court Act, § 735; Illinois Juvenile Court Act, Ill. Rev. Stat. Ch. 37 § 703-8(5) (Supp. 1966). See Columbia Law Review Note, pp. 306, 333-334; *Task Force*, p. 38; *cf. Harling* v. *United States*, 295 F.2d 161 (D.C. Cir. 1961).

in any manner; it does not distinguish degrees of incrimination. Similarly, for precisely the same reason, no distinction may be drawn between inculpatory statements and statements alleged to be merely 'exculpatory.'" *Id.* at 476-477.[64]

We also contend that, under the circumstances shown by this record, petitioner's statements were involuntary and should have been excluded on that ground as well. Constitutional standards of involuntariness continue to apply alongside the requirements of *Miranda*, and the failure to observe the *Miranda* safeguards is highly relevant to the question of voluntariness:

"that a defendant was not advised of his right to remain silent or of his right respecting counsel at the outset of interrogation, as is now required by *Miranda*, is a significant factor in determining the voluntariness

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[64] *Miranda* also required the exclusion of Chief Phillips' testimony that in response to the question what had happened, petitioner's father had said:

"I don't know, unless this boy." (A. 209.)

The only evidentiary theory which could allow in such testimony would be that of a tacit admission by a defendant based on his silence in the face of an accusatory statement. But this Court stated in *Miranda* that this theory is inconsistent with the privilege against self-incrimination:

"The prosecution may not therefore use at trial the fact that he stood mute or claimed his privilege in the face of accusation." *Id.* at 468 n. 37.

See also *Smith* v. *Brierly*, 2 Crim. L. Rep. 2164 (3rd Cir. 1967) (opinion of Hastie, J.), holding that the use of such a "tacit admission" is a denial of due process.

The father denied ever accusing petitioner of the crime and said that petitioner stated he did not do it and knew nothing about it. (A. 237.)

of statements later made." *Davis* v. *State*, 384 U.S. 737, 740 (1966).[65]

We submit that in the immediate context of the shocking discovery of a corpse beneath his bed, the interrogation of petitioner, barely 14 years old and without any previous contact with the law, by a battery of law enforcement officials, who did not warn him of his privilege against self-incrimination and his right to counsel, was inherently coercive. This Court emphasized in *Gault* that a strict standard must be applied to the determination of voluntariness of juvenile confessions, with particular attention paid to whether the juvenile was warned of his rights:

> "If counsel was not present for some permissible reason when an admission was obtained, *the greatest care must be taken to assure that the admission was voluntary, in the sense not only that it was not coerced or suggested, but also that it was not the product of ignorance of rights* or of adolescent fantasy, fright or despair." 387 U.S. at 55. (emphasis supplied)

A 14-year old, this Court has said:

> "cannot be compared with an adult in full possession of his senses and knowledgeable of the consequences of his admissions. He would have no way of knowing what the consequences of his confession were without

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[65] There can be no doubt that constitutional standards of involuntariness apply to juvenile delinquency proceedings. *In re Gault, supra*, 387 U.S. at 55. See also *In the Matter of Gregory W. and Gerald S.*, 19 N.Y.2d 55, 224 N.E.2d 102 (1966); *In the Interests of Carlo*, 48 N.J. 224, 255 A.2d 110 (1966); *United States* v. *Morales*, 223 F.Supp. 160 (D. Mont. 1964), all cited approvingly by this Court in *Gault*; Quick, *Constitutional Rights in the Juvenile Court*, 12 How. L. J. 76, 102 (1966).

advice as to his rights—from someone concerned with securing him those rights—and without the aid of more mature judgment as to the steps he should take in the predicament in which he found himself." *Gallegos* v. *Colorado, supra,* 370 U.S. at 54.

Under the principle of those cases and on the facts of this one, petitioner's statements to the interrogating authorities must be held to have been involuntary.

IV.

Petitioner Was Denied Due Process and Equal Protection by Being Deprived of the Right to Pre-Hearing Release and Subjected to Cruel and Inhuman Punishment Both Before and After the Adjudicative Hearing.

A. This record shows an unconscionable abuse of the detention power over a juvenile pending adjudicative hearing. The record establishes that:

1. There was no significant danger of flight by petitioner. His roots in the community were lifelong and deep. He had just turned fourteen, lived with his parents, went to school, regularly attended church and Sunday School, and participated in a variety of youth activities.

2. As the District Court of Appeals found, there "was an abundance of evidence" as to his "good character and reputation." He had been "obedient at home and at school and subjected himself to the reasonable control of both his parents and teachers." (A. 264.) He had never been in trouble with the law before.

3. Everyone who testified from a cross-section of his village agreed that there was no danger to the community if he was released to the custody of his parents. No one expressed any fear of his being free prior to his hearing.

4. He was charged with an act which would be a non-capital crime if committed by an adult, second-degree murder. The presumption of his innocence was deeply felt in the community. The evidence of his guilt—which the State never advanced at the release hearing as a ground for denying him release—was so thin as to amount to little more than suspicion, as we have discussed in Point I.

5. The detention facilities under which he was being held in solitary confinement were unfit. Indeed, the District Court of Appeals, on its own view of the premises, subsequently held the jail an illegal place of confinement for petitioner after he had been there for 78 days—27 of them before his hearing.

6. His parents and minister testified that it would be injurious to his health and well-being to remain in the jail under the conditions of his solitary confinement there.

7. The existence of reasonable alternatives was demonstrated, in the form of release to his parents or a neighbor. His parents were willing to accept any conditions the court might impose to assure his appearance for trial.

As against all this, the State offered only the contention that *if* he committed the crime, he would be dangerous to the community. The Prosecuting Attorney stated:

> "Now I regret always anyone having to be held in juvenile detention or jail, either one, Judge; we don't

like that. *But it is a situation of their doing, not ours;*" (A. 68-69.) (emphasis supplied)

And the juvenile court denied petitioner release without any findings and without any statement of reasons.

Denial of pre-hearing release under these circumstances contravenes some of the most basic assumptions of our system of justice. Chief Justice Vinson said that since 1789:

> "federal law has unequivocally provided that a person arrested for a non-capital offense *shall* be admitted to bail. *This traditional right to freedom before conviction permits the unhampered preparation of a defense, and serves to prevent the infliction of punishment prior to conviction.* [Citations omitted] *Unless this right to bail before trial is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning.*" *Stack* v. *Boyle,* 342 U.S. 1, 4 (1952). (emphasis supplied)[66]

If petitioner had been over 18 and charged with second-degree murder, he would have had an absolute right to bail under the Ohio Constitution, providing that:

> "All persons shall be bailable by sufficient sureties, except for capital offenses where the proof is evident or the presumption great. Excessive bail shall not be required; nor excessive fines imposed; nor cruel and unusual punishments inflicted." Art. I, § 9.[67]

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[66] "The law of bail stands four-square across the path to the easy assumption that he who is charged with crime is indiscriminately dangerous." Goldstein, *The State and the Accused: Balance of Advantage in Criminal Procedure,* 69 Yale L. J. 1149, 1195 (1960).

[67] The bail language of the Ohio Constitution is virtually the same as that of the famous Northwest Ordinance of 1787. The latter is

See also Ohio Rev. Code Ann. § 2937.03.

This right to bail is not limited to criminal cases in Ohio but applies in civil cases as well:

> "[A]t the present time statutory and constitutional provisions have become so general that it can be said that one has the right to bail in all civil cases, involving the arrest of the defendant . . . every person arrested in a civil action is entitled to bail upon giving bond with sufficient sureties or upon deposit of money in lieu of bail." 7 Ohio Juris.2d, Bail and Recognizance, § 54, p. 78.

Adults charged with offenses triable in the juvenile courts receive the benefits of bail just as they would if tried in the adult courts. Ohio Rev. Code Ann. § 2151.46. And a juvenile charged with a bailable felony and certified to adult court is placed on a recognizance for his appearance in that court. *Id.* § 2151.26.

Thus, once again, juveniles charged in the juvenile court constitute a unique class. See *State ex rel. Peaks* v.

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contemporaneous with the Eighth Amendment to the Federal Constitution, which was clearly intended to create the same absolute right of pre-trial release in noncapital cases. See Foote, *The Coming Constitutional Crisis in Bail*, 113 U. Pa. L. Rev. 959, 1125 (1965); Remarks of Chief Justice Warren, National Conference on Bail and Criminal Justice, Proceedings, May 27-29, 1964, Interim Report, May 1964-April 1965, p. 7 (hereinafter cited as "National Conference on Bail and Criminal Justice").

Although it appears that this Court has not explicitly passed on the right of bail in state court proceedings under the Fourteenth Amendment, lower federal courts have treated it as applicable: "We take it for granted that . . . the prohibition in the Eighth Amendment against requiring excessive bail must now be regarded as applying to the States, under the Fourteenth Amendment." *Pilkinton* v. *Circuit Court*, 324 F.2d 45, 46 (8th Cir. 1963); *Mastrian* v. *Hedman*, 326 F.2d 708, 711 (8th Cir. 1964), *cert. denied*, 376 U.S. 965.

Allaman, 115 N.E.2d 849 (Ohio App. 1952). As this case illustrates, their liberty pending adjudicative hearing is in the discretion of one man, the juvenile court judge, despite the public policy of the state in favor of releasing juveniles to their parents.[68]

We submit that such an absolute power is incompatible with the rule of law. As this Court said in *Kent, supra,* in words which cannot be emphasized too strongly, juvenile court acts do not "confer upon the Juvenile Court a license for arbitrary procedure." 383 U.S. at 553. Instead of the presumption of innocence, the right to be free from punishment prior to adjudication, and the opportunity to assist his counsel effectively and without restriction in preparation of his defense, petitioner received 27 days of solitary confinement prior to his hearing in an adult jail unfit and illegal for his confinement.

Moreover, this case is merely the tip of the iceberg. The National Crime Commission laid great stress on the evils and abuses arising from the unregulated discretionary powers of detention over juveniles in many states: detention without showing of danger to the community safety or need to protect the juvenile; detention employed for shock effect; detention without articulated standards; inadequate and overcrowded detention facilities, frequently

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[68] The juvenile code provides:

"Whenever any officer takes a child into custody, he shall, unless it is impracticable or has been otherwise ordered by the juvenile court, accept the written promise of the parent, guardian, or custodian to bring the child to the court at the time fixed. Thereupon such child may be released in the custody of a parent, guardian, or custodian." Ohio Rev. Code Ann. § 2151.31.

leading to confinement of juveniles in adult jails, as occurred in this case.[69]

Judge George Edwards has graphically described the abuses of detention, of which this case is a grievous example:

> "I charge that thousands upon thousands of children now in detention in this country are held behind bars without court hearing or order, and under circumstances which many lawyers deem in violation of the Constitution of the United States.
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> I charge that hundreds upon hundreds of children are held illegally in adult jails each year in this country.
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> I charge that most children now in detention are held in institutions which at best represent cold storage, and at worst penal regimes similar to adult penitentiary practices, and that in 1964 treatment for and human concern and contact with children in detention is the exception, in the detention homes of this country, rather than the rule." National Conference on Bail and Criminal Justice, pp. 262-263.[70]

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[69] *Task Force,* pp. 13, 19, 36-37. A study prepared for the Commission showed that for 93 percent of the country's juvenile court jurisdictions, serving 44.3 percent of the population, "there is no place of detention other than the county jail, and many of the jails used for children are unsuitable even for adult offenders." *Id.* at 37.

The Prosecuting Attorney in this case stated that 127 children were held in the Fairfield County jail in 1965, for periods as long as 92 days. (A. 68.)

[70] See also Freed & Wald, *Bail in the United States: 1964,* report to the National Conference on Bail and Criminal Justice, p. 105:

(continued on following page)

The effects of pre-trial detention on the guilt-determining process in adult cases have been documented, and there is no reason to believe they are any less adverse in juvenile cases. Persons held in custody before trial have a substantially greater chance of being found guilty than persons who are released and are freely available to consult with and assist their counsel. See Wald, *Pretrial Detention and Ultimate Freedom: A Statistical Study*, 39 N.Y.U. L. Rev. 631 (1964); Rankin, *The Effect of Pretrial Detention*, 39 N.Y.U. L. Rev. 641 (1964).

The only resolution of this issue consistent with our traditions and adapted to the abuses of juvenile detention is the recognition either of a right of bail for juveniles or its substantial equivalent in the form of a right of prehearing release. As Judge Edwards has said:

> "the juvenile code and the whole philosophy of the juvenile court mandate such pre-hearing release even more specifically than our statutes mandate the right to bail." National Conference on Bail and Criminal Justice, at 265.

Judge Orman Ketcham, past president of the National Council of Juvenile Court Judges, concurs:

"over 100,000 children are detained each year in ordinary jails or jail-like structures and according to the National Council on Crime and Delinquency, the number increases each year. . . . With a few notable exceptions, juvenile detention facilities have been characterized as a 'national disgrace.'"

In addition, denial of bail to children involved in civil rights demonstrations has been a frequent occurrence and "the practice has had a serious punitive effect." Goldfarb, *Ransom*, p. 73 (1965). See *Ex parte Cromwell*, 232 Md. 305, 192 A.2d 775 (1963).

"I personally believe that, where a youth is charged with a violation of the criminal law which he denies, the juvenile court, if it is not willing to release him to his parents on their personal assurances, should permit his parents to post bail bond for him pending trial." *Id.* at 284.

Other leading authorities have stated that:

"In any jurisdiction where children are detained before trial, for long periods, without hearings, in miserable quarters, or commingled with adults, the philosophy of the juvenile court system is betrayed. Wherever this occurs, a suitable alternative to detention should be found, for no good reason appears why the law should accord a child fewer rights and less protection than his elders." Freed & Wald, *Bail in the United States: 1964*, p. 111.

See also Boches, *supra*, 19 Hastings L. J. at 76-77.

The right to bail for juveniles has been recognized by statute and judicial decision in a number of jurisdictions. Others have fashioned a right to release under appropriate conditions, unless the necessity for detention under prescribed judicial standards is demonstrated.[71]

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[71] Jurisdictions recognizing either a right to bail or such a right of prehearing release are set forth in Appendix C, *infra*.

"If the relevant statute is silent on the subject it should be read as assuming the right to bail exists when a child is placed in detention. If release on bail is denied by statute, it must be denied only after a judicial determination that considerations of safety require detention. Any other justification for detention without bail discriminates against the child. At least in the situation where the child may be certified for criminal trial, there seems little doubt that this discrimination

"detention of a child is rarely desirable before an adjudication and rarely is needed to avoid a grave risk to the community or the child." Comment to *id.* § 727.[72]

Likewise, California has provided that a juvenile shall be released pending hearing unless:

"it appears that such minor has violated an order of the juvenile court or has escaped from the commitment of the juvenile court or that it is a matter of immediate and urgent necessity for the protection of such minor or the person or property of another that he be detained or that such minor is likely to flee the jurisdiction of the court. . . . " Calif. Welf. & Inst'ns Code § 635.[73]

Detention pending adjudicative hearing is not the discretionary act of a single man under such statutory provisions,

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[72] Compare the comment of Assistant Chief of Police Raymond A. Dahl of Milwaukee, Wisconsin:

"A child should not be placed in detention when his parents can and will control him and present him at court when ordered."

"Children should not be detained merely to facilitate a police investigation or merely because of the seriousness of the offense or the suspicion of the commission of a crime." National Conference on Bail and Criminal Justice, p. 268.

[73] This is in accord with the recommendations of the National Council on Crime and Delinquency, urging that detention be limited essentially to juveniles who "are almost certain to run away" pending final adjudication and disposition, "or almost certain to commit an offense dangerous to themselves or to the community" in such period, or who must be held for another jurisdiction. National Council on Crime and Delinquency, Standard Juvenile Court Act, Comment on Section 17, pp. 40-41 (1959). The Council also states:

"Jailing of any child under sixteen should not be tolerated anywhere." *Id.* at 40.

but a judicial determination, made after hearing, according to prescribed standards as applied to the facts of an individual case. Petitioner's pre-hearing detention, on the other hand, was ordered without standards, without reasons, and in the teeth of the evidence. It was detention based on fiat, not law.

It should be emphasized that the right of pre-hearing release for which we contend does not contemplate delivering juveniles into the hands of professional bondsmen or making release dependent on ability to pay—aspects of the traditional bail system which have led some persons to urge that it not be applied to juvenile courts. See *Task Force*, p. 36. In this respect the Federal Bail Reform Act of 1966, 18 U.S.C. § 3146, provides a model of how a right of pre-trial release can be implemented through imaginative use of judicially imposed conditions to assure appearance at trial. That Act provides that any person charged with a noncapital offense "shall be released pending trial on his personal recognizance or upon the execution of an unsecured appearance bond" unless it is judicially determined that this will not "reasonably assure" his appearance. In that eventuality, a judicial officer is authorized to impose specified conditions to assure his appearance, *inter alia*:

(1) placing the person "in the custody of a designated person or organization agreeing to supervise him";

(2) restricting his "travel, association, or place of abode" during release;

(3) requiring deposit of security with the court or execution of a bail bond; or

(4) "any other condition deemed reasonably necessary to assure appearance as required, including a condition requiring that the person return to custody after specified hours." *Id.* § 3146(a).

There is no reason why a similar utilization of the power to release on appropriate conditions cannot be employed by juvenile courts. It will enable them to give maximum protection to any legitimate community interests in a particular case in preventing harm to the juvenile himself or to others and to the overriding interest of the juvenile in maintaining his personal liberty prior to adjudicative hearing.[74]

B. We also contend that petitioner's solitary confinement in the county jail for a period of 78 days—27 before hearing and the remainder afterward—constituted the infliction of cruel and inhuman punishment on him, in violation of his constitutional rights.[75] This Court should establish that such punishment of juveniles cannot be countenanced under generally accepted standards of the enlightened administration of justice in this country.

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[74] The United States Court of Appeals for the District of Columbia Circuit in *Fulwood* v. *Stone*, No. 21,401, decided November 28, 1967, said:

> "Even when removal from the family is deemed necessary it does not follow that the juvenile is automatically to be committed to the Receiving Home. . . . The choices are not so limited. The Juvenile Court has a duty to fashion an appropriate disposition. . . ." Slip Opinion, p. 7.

The Court also commented:

> "Since the Receiving Home is hardly 'equivalent to' the ordinary home environment [citation omitted], it should only be a last resort where no suitable alternative exists." *Id.*

[75] The "cruel and unusual punishment" clause of the Eighth Amendment has been held applicable to the states under the Fourteenth Amendment. *Robinson* v. *California*, 370 U.S. 660 (1962).

> "The exact scope of the constitutional phrase 'cruel and unusual' has not been detailed by this Court. But the basic policy reflected in these words is firmly established in the Anglo-American tradition of criminal justice. . . . The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." *Trop* v. *Dulles,* 346 U.S. 86, 100-01 (1958) (opinion of Chief Justice Warren).

That petition was subjected to punishment by his imprisonment in the county jail cannot be doubted. The District Court of Appeals held his confinement to be illegal under state law after it had gone on for 78 days. During this period, there was no "treatment," no attempted "rehabilitation" of petitioner—even assuming that he needed it, which we deny. There was simply solitary confinement in a jail cell.

Ohio law makes it plain that such imprisonment contravened the basic purposes and justifications of the juvenile code: to provide "correction and rehabilitation" and not "punishment." *Cope* v. *Campbell,* 175 Ohio St. 475, 478, 196 N.E.2d 457, 459 (1964). Not only is it unlawful to detain a juvenile in an adult penal institution under the conditions to which petitioner was subjected, but the law puts an affirmative duty on the boards of county commissioners to provide a juvenile detention home for juvenile offenders pending their final disposition. This place of detention "shall be furnished and carried on, as far as possible, *as a family home* in charge of a superintendent or matron in a non-punitive neutral atmosphere." Ohio Rev. Code Ann. § 2151.34. (emphasis supplied). During the school year,

when feasible, a "comparable educational program" is to be provided for children of school age. Medical and mental health facilities shall be made available "to insure the courts all possible treatment facilities shall be given to those children placed under their care." *Id.* The state thus has defined the appropriate conditions and atmosphere in which treatment and rehabilitation of juveniles shall take place; petitioner's imprisonment, on the other hand, had all the earmarks of punishment.[76]

It also cannot be doubted that petitioner's imprisonment under the conditions shown in this record was punishment of cruel and inhuman character. He was treated worse than an adult criminal would have been. By reason of the denial of his pre-hearing release, he was subjected to imprisonment in advance of any adjudication of guilt, punishment which an adult would not have received because of the right of adults to bail.

This Court has had occasion to comment at length on the evils of solitary confinement, even for convicted adult murderers. In *Medley* v. *State,* 134 U.S. 160 (1890), this Court ordered the release of a convicted murderer, who had been condemned to death and ordered held in solitary confinement pending his execution under an *ex post facto* statute. The Court characterized the solitary confinement provision as "an additional punishment of the most important and painful character." 134 U.S. at 171.

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[76] The duty of the county officials to provide a detention home of the prescribed character is deemed so important that it has been held enforceable by mandamus. *State ex rel. Ray* v. *South,* 176 Ohio St. 241, 199 N.E.2d 919 (1964); 1961 Op. Atty. Gen., p. 75. See also Ohio Rev. Code Ann. § 2151.65, providing for schools, forestry camps, or other facilities where delinquents "may be held for *training, treatment,* and *rehabilitation.*" (emphasis supplied)

The Court traced the history of solitary confinement in Anglo-American law back to its first statutory enactment in the time of George II, when it was provided for convicted murderers. The Court stated:

> "it was considered as an additional punishment of such a severe kind that it is spoken of in the preamble as 'a further terror and peculiar mark of infamy' to be added to the punishment of death." *Id.* at 170.

Provision for solitary confinement was subsequently repealed in England by statute because "public sentiment revolted against this severity." *Id.* Experimentation with it as a mode of punishment in America disclosed that:

> "A considerable number of the prisoners fell, after even a short confinement, into a semi-fatuous condition, from which it was next to impossible to arouse them, and others became violently insane; others, still, committed suicide; while those who stood the ordeal better were not generally reformed, and in most cases did not recover sufficient mental activity to be of any subsequent service to the community." *Id.* at 168.

If solitary confinement has been deemed by this Court to be punishment of such severity in the case of an adult, how much more so must it be for a 14-year old boy—abruptly wrenched from his home, separated from his parents and his friends, interrupted in his schooling, and thrust alone into a prison cell. If solitary confinement is cruel and unusual punishment for a convicted adult murderer, it must be so for a juvenile, who has not committed a crime according to the juvenile code and is ostensibly a ward of the state entitled to its special care and treatment.

Even for a day, this imprisonment would be cruel and inhuman, yet it continued for 78 days.

This Court has said:

> "To be sure, imprisonment for ninety days is not, in the abstract, a punishment which is either cruel or unusual. But the question cannot be considered in the abstract. Even one day in prison would be cruel and unusual punishment for the 'crime' of having a common cold." *Robinson* v. *California*, 370 U.S. 660, 667 (1962).

This denial of petitioner's constitutional rights should invalidate the proceedings against him. Otherwise it is difficult to see how the constitutional prohibition against cruel and unusual punishment—so egregiously violated here—can be enforced in his case. This Court would also make it clear thereby that subjection of children to such cruelty and inhumanity is intolerable in a free country.[77]

In any event, what petitioner has been subjected to shows the reality underlying this Court's statement in *Kent* that:

> "There is evidence . . . that there may be grounds for concern that the child receives the worst of both

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[77] "Just as the only effective way to discourage lawless collection of evidence is to make its finding inadmissible and its efforts profitless so the only effective way to discourage excesses by prison officials might be to loose the object of their cruel and unusual punishment. Such releases might be a cheap price to pay for prison reforms due to resulting pressure by the public on the responsible officials." Sutherland, *Due Process and Cruel Punishment*, 64 Harv. L. Rev. 271, 272-273 (1950). *Cf. Weems* v. *United States*, 217 U.S. 349 (1910); *Medley* v. *State*, *supra*; *Johnson* v. *Dye*, 175 F.2d 250 (3rd Cir. 1949), *rev'd on other grounds*, 338 U.S. 864 (1949).

worlds: that he gets neither the protections accorded to adults nor the solicitous care and regenerative treatment postulated for children." 383 U.S. at 556.

A principal justification for denial to juveniles of procedural rights accorded to adults has been that juveniles are afforded "special consideration and treatment." *In re Gault*, 387 U.S. at 22-23 n. 30. This case demonstrates how illusory this notion of a *quid pro quo* can be. Petitioner was denied the procedural rights of an adult charged with crime. In return he received 78 days of solitary confinement and was adjudged a murderer on insubstantial evidence by inherently unfair fact-finding procedures. If the premise of the system fails in petitioner's case, the denial to him of basic constitutional rights must fall with it.[18]

These cases—*Kent*, *Gault*, and now this case—are like searchlights cast into the recesses of the juvenile court system in this country. They illuminate some of the institutional weaknesses of the system and point the way to its improvement without sacrifice of its distinctive values or its potentiality for achievement.

But this case is also a human tragedy. Petitioner has lost a year and a half of one of the most precious things he will ever have—his youth. This loss can never be restored to him, but his liberty can. And the liberty of others throughout this country can be safeguarded by protecting his rights. This Court should vindicate his constitutional

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[18] See *In re Gault*, *supra*, 387 U.S. at 22-23 n. 30; Wheeler, Cottell & Romasco, *Juvenile Delinquency—Its Prevention and Control, Task Force*, pp. 421-422.

rights and allow him to be restored to his family and community to try to pick up the severed thread of his life.

Conclusion

For these reasons, the judgment below should be reversed.

Respectfully submitted,

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APPENDICES

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Article I, § 9, of the Ohio Constitution provides:

> "All persons shall be bailable by sufficient sureties, except for capital offenses where the proof is evident or the presumption great. Excessive bail shall not be required; nor excessive fines imposed; nor cruel and unusual punishments inflicted."

Article I, § 10, of the Ohio Constitution provides in pertinent part:

> "In any trial, in any court, the party accused shall be allowed . . . a speedy public trial by an impartial jury of the county in which the offense is alleged to have been committed."

The Ohio juvenile court statutes provide in pertinent part:

Section 2151.01 Definitions:

> "(A) As used in the Revised Code, 'juvenile judge' or 'juvenile court' means the judge or the court exercising the powers and jurisdiction conferred in sections 2151.01 to 2151.54, inclusive, of the Revised Code.
>
> (B) As used in sections 2151.01 to 2151.54, inclusive, of the Revised Code:

(1) 'Child' includes any child under eighteen years of age, except that wherever reference is made in such sections to a crippled or otherwise physically handicapped child 'child' includes any person under twenty-one years of age.

(2) 'Adult' includes any person eighteen years of age, or over, who is not a 'child' within the meaning of division (B)(1) of this section.

(3) 'Foster home' means a family home in which any child is received apart from his parents for care, supervision, or training.

(4) 'Certified foster home' means a foster home operated by persons holding a permit in force, issued pursuant to sections 5103.03 to 5103.05, inclusive, of the Revised Code.

(5) 'Organization' means any institution, public, semipublic, or private, and any private association, society, or agency located or operating in the state, incorporated or unincorporated, having among its functions the furnishing of protective services or care for children, or the placement of children in foster homes or elsewhere.

(6) 'Certified organization' means any organization mentioned under division (B)(5) of this section which holds a certificate in force, issued pursuant to sections 5103.03 to 5103.05, inclusive, of the Revised Code.

(7) 'Relative' of, or person 'related by blood or marriage' to any child means any person or the spouse of any person whose relationship to such child is not more distant than that of first cousin; that is, not more distant than four degrees of relationship reckoned according to civil law."

Section 2151.02 "Delinquent child" defined:

"As used in sections 2151.01 to 2151.54, inclusive, of the Revised Code, 'delinquent child' includes any child:

(A) Who violates any law of this state, the United States, or any ordinance or regulation of a subdivision of the state, except as provided in section 2151.021 [2151.02.1] of the Revised Code;

(B) Who does not subject himself to the reasonable control of his parents, teachers, guardian, or custodian, by reason of being wayward or habitually disobedient;

(C) Who is an habitual truant from home or school;

(D) Who so deports himself as to injure or endanger the morals or health of himself or others;

(E) Who attempts to enter the marriage relation in any state without the consent of his parents, custodian, legal guardian, or other legal authority."

Section 2151.03 "Neglected child" defined:

"As used in sections 2151.01 to 2151.54, inclusive, of the Revised Code, 'neglected child' includes any child:

(A) Who is abandoned by his parents, guardian or custodian;

(B) Who lacks proper parental care because of the faults or habits of his parents, guardian, or custodian;

(C) Whose parents, guardian or custodian neglects or refuses to provide him with proper or necessary subsistence, education, medical or surgical care, or other care necessary for his health, morals, or well being;

(D) Whose parents, guardian, or custodian neglects or refuses to provide the special care made necessary by his mental condition;

(E) Who is found in a disreputable place, visits or patronizes a place prohibited by law; or associates with vagrant, vicious, criminal, notorious, or immoral persons;

(F) Who engages in an occupation prohibited by law, or is in a situation dangerous to life or limb or injurious to the health or morals of himself or others."

Section 2151.04 "Dependent child" defined:

"As used in sections 2151.01 to 2151.54, inclusive, of the Revised Code, 'dependent child' includes any child:

(A) Who is homeless or destitute or without proper care or support, through no fault of his parents, guardian, or custodian;

(B) Who lacks proper care or support by reason of the mental or physical condition of his parents, guardian, or custodian;

(C) Whose condition or environment is such as to warrant the state, in the interests of the child, in assuming his guardianship;

(D) Whose parent or parents or legal guardian or custodian have placed or attempted to place such child in violation of sections 5103.16 and 5103.17 of the Revised Code."

Section 2151.05 Child without proper parental care:

"Under sections 2151.01 to 2151.54, inclusive, of the Revised Code, a child whose home is filthy and unsanitary; whose parents, stepparents, guardian, or custodian permit him to become dependent, neglected, or delinquent; whose parents, stepparents, guardian, or custodian, when able, refuse or neglect to provide him with necessary care, support, medical attention, and educational facilities; or whose parents, stepparents, guardian, or custodian fail to subject such child to necessary discipline is without proper parental care or guardianship."

Section 2151.07 Court having jurisdiction; absence of judge:

"The juvenile court, or the court of common pleas, division of domestic relations, of any county, separately and independently created, established, and functioning as such, has and shall exercise the powers and jurisdiction conferred in sections 2151.01 to 2151.55, inclusive, and section 2151.99 of the Revised Code. Except in counties in which there now is or may hereafter be created, a separate and independent juvenile court or court of domestic relations, there is hereby established within the probate court a juvenile court, presided over by the probate judge, which shall be a court of record and exercise the powers and jurisdiction of such a court.

Whenever the juvenile judge of the juvenile court is absent from the county, or is unable to attend court, or the volume of cases pending in court necessitates it, upon the request of said judge, the presiding judge of the court of common pleas shall assign a judge of the court of common pleas of the county to act in his place or in conjunction with him. If no such judge is available for said purpose, the chief justice of the supreme court shall assign a judge of the court of common pleas, a juvenile judge, or a probate judge from some other county to act in the place of such judge or in conjunction with him, who shall receive such compensation and expenses for his services as is provided by section 141.07 of the Revised Code for judges assigned to hold court in courts of common pleas."

Section 2151.13 Employees; compensation; bond:

"The juvenile judge may appoint such bailiffs, probation officers, and other employees as are necessary and may designate their titles and fix their duties, compensation, and expense allowances. The juvenile

court may by entry on its journal authorize any deputy clerk to administer oaths when necessary in the discharge of his duties. Such employees shall serve during the pleasure of the judge.

The compensation and expenses of all employees and the salary and expenses of the judge shall be paid in semimonthly installments by the county treasurer from the money appropriated for the operation of the court, upon the warrant of the county auditor, certified to by the judge.

The judge may require any employee to give bond in the sum of not less than one thousand dollars, conditioned for the honest and faithful performance of his duties. The sureties on such bonds shall be approved in the manner provided by section 2151.12 of the Revised Code. The judge shall not be personally liable for the default, misfeasance, or nonfeasance of any employee from whom a bond has been required."

Section 2151.14 Duties and powers of probation department; records; command assistance:

"The chief probation officer, under the direction of the juvenile judge, shall have charge of the work of the probation department. The department shall make such investigations as the juvenile court directs, keep a written record of such investigation, and submit the same to the judge or deal with them as he directs. The department shall furnish to any person placed on probation a statement of the conditions of probation and shall instruct him regarding them. The department shall keep informed concerning the conduct and condition of each person under its supervision and shall report thereon to the judge as he directs. Each probation officer shall use all suitable methods to aid persons on probation and to bring about improvement in their conduct and condition. The department shall keep full records of its work, keep accurate and com-

plete accounts of money collected from persons under its supervision, give receipts therefor, and make reports thereon as the judge directs.

The reports and records of the department shall be considered confidential information and shall not be made public. A probation officer may serve the process of the court within or without the county, and may make arrests without warrant upon reasonable information or upon view of the violation of sections 2151.01 to 2151.54, inclusive, of the Revised Code, detain the person arrested pending the issuance of a warrant, and perform such other duties, incident to his office, as the judge directs. All sheriffs, deputy sheriffs, constables, marshals, chiefs of police, and other police officers shall render assistance to probation officers in the performance of their duties when requested to do so by any probation officer."

Section 2151.15 Powers and duties vested in county department of probation:

"When a county department of probation has been established in the county and the juvenile judge does not establish a probation department within the juvenile court as provided in section 2151.14 of the Revised Code, all powers and duties of the probation department provided for in sections 2151.01 to 2151.54, inclusive, of the Revised Code, shall vest in and be imposed upon such county department of probation.

In counties in which a county department of probation has been or is hereafter established the judge may transfer to such department all or any part of the powers and duties of his own probation department; provided that all juvenile cases shall be handled within a county department of probation exclusively by an officer or division separate and distinct from the officers or division handling adult cases."

Section 2151.16 Referees; powers and duties:

"The juvenile judge may appoint and fix the compensation of referees who shall have the usual power of masters in chancery cases, provided, in all such cases submitted to them by the juvenile court, they shall hear the testimony of witnesses and certify to the judge their findings upon the case submitted to them, together with their recommendation as to the judgment or order to be made in the case in question. The court, after notice to the parties in the case of the presentation of such findings and recommendation, may make the order recommended by the referee, or any other order in the judgment of the court required by the findings of the referee, or may hear additional testimony, or may set aside said findings and hear the case anew. In appointing a referee for the trial of females, a female referee shall be appointed where possible."

Section 2151.17 Rules of juvenile court:

"The juvenile court may prescribe rules regulating the docketing and hearing of causes, motions, and demurrers, and such other matters as are necessary for the orderly conduct of its business and the prevention of delay, and for the government of its officers and employees, including their conduct, duties, hours, expenses, leaves of absence, and vacations."

Section 2151.18 Records; annual report; copies for distribution:

"The juvenile court shall maintain records of all official cases brought before it, including an appearance docket, a journal, and a cashbook. The court shall maintain a separate docket for traffic offenses, in which case, all traffic cases shall be recorded thereon instead of on the general appearance docket. The parents of any child affected, if living, or if deceased,

the nearest of kin, may inspect such records, either in person or by counsel during the hours in which such court is open.

Not later than June of each year, the court shall prepare an annual report covering the preceding calendar year showing the number and kinds of cases that have come before it, the disposition thereof, and such other data pertaining to the work of the court as the juvenile judge directs or as the department of public welfare requests. Copies of such report shall be filed with such department and with the board of county commissioners. With the approval of such board copies may be printed for distribution to persons and agencies interested in the court or community program for dependent, neglected, or delinquent children and juvenile traffic offenders. The number of copies ordered printed and the estimated cost of each printed copy shall appear on each copy of such report printed for distribution."

Section 2151.19 Summons; expense:

"The summons, warrants, citations, subpoenas, and other writs of the juvenile court may issue to a probation officer of any such court or to the sheriff of any county or any marshal, constable, or police officer, and the provisions of law relating to the subpoenaing of witnesses in other cases shall apply in so far as they are applicable.

When a summons, warrant, citation, subpoena, or other writ is issued to any such officer, other than a probation officer, the expense in serving the same shall be paid by the county, township, or municipal corporation in the manner prescribed for the payment of sheriffs, deputies, assistants, and other employees."

Section 2151.23 Jurisdiction:

"(A) The juvenile court has exclusive original jurisdiction under the Revised Code:

(1) Concerning any child who is a juvenile traffic offender or who is delinquent, neglected, dependent, crippled, or otherwise physically handicapped;

(2) To determine the custody of any child not a ward of another court of this state;

(3) To determine the paternity of any child alleged to have been born out of wedlock and to provide for the support of such child, subject to the concurrent jurisdiction of other courts.

(B) Such court has original jurisdiction to determine all cases of misdemeanors charging adults:

(1) With contributing to, encouraging, or tending to cause by any act or omission the delinquency, neglect, or dependency of any child;

(2) With any act or omission with respect to any child, which act or omission is a violation of any state law or any municipal ordinance;

(3) With abandonment or failure to provide subsistence to any child for which he is legally responsible.

(C) Such court, except as to juvenile courts separately and independently created, has jurisdiction to hear, determine, and make a record of any action for divorce or alimony involving the custody or care of children filed in the court of common pleas and certified by the presiding judge of the court of common pleas with all the papers filed therein to the court for trial, provided that no such certification shall be made to any court unless the consent of the juvenile judge is first obtained. After such certification is made and consent obtained, the court shall proceed as if such action were originally begun in said court, except as to awards for alimony or support due and unpaid at

the time of certification, over which the court has no jurisdiction.

(D) Such court has jurisdiction to hear and determine the case of any child certified to the court by any court of competent jurisdiction, and to make disposition of said child in accordance with sections 2151.01 to 2151.54, inclusive, of the Revised Code.

Section 2151.24 Separate room for hearings:

"The board of county commissioners shall provide a special room not used for the trial of criminal or adult cases, when available, for the hearing of the cases of dependent, neglected, and delinquent children."

Section 2151.25 Arrest of child:

"When a child is arrested under any charge, complaint, affidavit, or indictment, whether for a felony or a misdemeanor, such child shall be taken directly before the juvenile court. If the child is taken before a judge of the county court, mayor, judge of the police or municipal court, or judge of the court of common pleas other than a juvenile court, such judge of the county court, mayor, judge of the police or municipal court, or judge of the court of common pleas shall transfer the case to the juvenile court. The officers having such child in charge shall take him before the juvenile judge, who shall proceed to hear and dispose of the case in the same manner as if the child had been brought before him in the first instance. Upon such transfer or taking of such child before such judge, all further proceedings under the charge, complaint, information, or indictment shall be discontinued in the court of said judge of the county court, mayor, police or municipal judge, or judge of the court of common pleas other than a juvenile court, and the case relating to such child shall thenceforth be within the exclusive juris-

diction of the juvenile court and shall be deemed to be upon a complaint filed in such court as fully as if the appearance of such child had been upon a complaint filed in and a citation or warrant of arrest originally issued by such court."

Section 2151.26 Child charged with felony:

"In any case involving a delinquent child under sections 2151.01 to 2151.54, inclusive, of the Revised Code, who has committed an act which could be a felony if committed by an adult, the juvenile judge, after full investigation and after a mental and physical examination of such child has been made by the bureau of juvenile research, or by some other public or private agency, or by a person qualified to make such examination, may order that such child enter into a recognizance with good and sufficient surety, subject to the approval of the judge, for his appearance before the court of common pleas at the next term thereof, for such disposition as the court of common pleas is authorized to make for a like act committed by an adult; or the judge may exercise the other powers conferred in such sections in disposing of such case."

Section 2151.27 Complaint involving child:

"Any person having knowledge of a child under eighteen years of age who appears to be a juvenile traffic offender or to be delinquent, neglected, or dependent, or of a crippled or otherwise physically handicapped child under twenty-one years of age may, with respect to such juvenile traffic offender or such delinquent, neglected, or dependent child, file a sworn complaint, and with respect to such crippled or otherwise physically handicapped child file an application for care in the juvenile court of the county in which such child has a residence or legal settlement, or in which such traffic offense, delinquency, neglect, or de-

pendency occurred, or, in case of a crippled child, where such child is found. Such application or sworn complaint may be upon information and belief and, except for traffic offenses, shall be sufficiently definite by using the word delinquent, neglected, dependent, crippled, or physically handicapped, as the facts may be."

Section 2151.28 Citation of parties; hearing, subpoena:

"After a complaint or an application for care has been filed under section 2151.27 of the Revised Code, and after such further investigation as the juvenile court directs, unless the parties voluntarily appear, the court shall issue a citation reciting briefly the substance of the complaint or application and requiring the parents, guardian, or the persons who have the custody or control of the child, or with whom such child may be, to appear personally and bring the child before the court at the time and place stated. If the person cited is other than the parent or guardian of the child, then the parent or guardian, or both, shall also be notified of the pendency of the case and of the time and place of hearing.

Before any temporary commitment is made permanent, the court shall fix a time and place for hearing and shall cause notice thereof to be served upon the parent or guardian of the child, or published, as provided in section 2151.29 of the Revised Code.

Any person whose presence is considered necessary and who is not cited may be subpoenaed to appear and testify at the hearing. Any one cited or subpoenaed to appear who fails to do so may be punished, as in other cases in the court of common pleas, for contempt of court. Persons subpoenaed shall be paid the same witness fees as are allowed in the court of common pleas.

If it appears that the child is in such conditions or surroundings that his welfare requires that his custody be immediately assumed by the court, the juvenile judge may cause an order to be indorsed upon the citation that the officer serving the same shall take the child into custody at once."

Section 2151.29 Service of citations, notices, and subpoenas; publication of citation:

"Services of the citations, notices, and subpoenas, prescribed by section 2151.28 of the Revised Code, shall be made by delivering a copy to the person cited, notified, or subpoenaed, or by leaving a copy at his usual place of residence; provided that if the juvenile judge is satisfied that such service is impracticable, he may order service by registered mail.

Whenever it appears from affidavit that a parent, guardian, or other person having the custody of such child resides or has gone out of the state or that his place of residence is unknown so that such citation cannot be served on him, the clerk shall publish such citation once in a newspaper published in the county and of general circulation throughout the county, if there is one so published. The citation shall state the substance and the time and place of the hearing, which shall be held at least one week later than the date of the publication. A copy of such citation shall be sent by mail to the last known address of such parent, guardian, or other person having custody of such child, unless said affidavit shows that a reasonable effort has been made without success to ascertain such address. The certificate of the clerk that such publication has been made or such citation mailed shall be sufficient evidence thereof. When such period of one week from the time of publication has elapsed, the juvenile court shall have full jurisdiction to deal with such child as provided by sections 2151.01 to 2151.54, inclusive, of the Revised Code."

Section 2151.30 Issuance of warrant:

"In any case when it is made to appear to the juvenile judge that the service of a citation under section 2151.29 of the Revised Code will be ineffectual or the welfare of the child requires that he be brought forthwith into the custody of the juvenile court, a warrant may be issued against the parent, custodian, or guardian, or against the child himself."

Section 2151.31 Custody of child pending hearing; child may be fingerprinted:

"Whenever any officer takes a child into custody, he shall, unless it is impracticable or has been otherwise ordered by the juvenile court, accept the written promise of the parent, guardian, or custodian to bring the child to the court at the time fixed. Thereupon such child may be released in the custody of a parent, guardian, or custodian. If not so released, such child shall be placed in the custody of a probation officer or other person designated by the court, or taken immediately to the court or to the place of detention designated by the court, and the officer taking such child shall immediately notify the court with a written report of the condition or situation which caused the child to be brought in and shall file a complaint when directed to do so by the court.

In the case of any child whose custody has been assumed by the court, pending the final disposition of the case, the child may be released in the custody of a parent, guardian, or custodian, or of a probation officer or other person appointed by the court, to be brought before the court at the time designated. When not released, such child, pending the hearing of the case, shall be detained in such place as shall be designated by the court, subject to further order.

This section does not forbid any peace officer, police officer, probation officer, or other person authorized by

the juvenile judge from taking into custody any child who is found violating any law or ordinance, or who is reasonably believed to be a fugitive from his parents or from justice, or whose surroundings are such as to endanger his health, morals, or welfare. No child shall be fingerprinted or permitted to be fingerprinted or photographed by any officer or other person holding him in custody without the consent of the judge. When the judge permits the fingerprinting of any child, the prints shall be taken on a civilian and not on a criminal card and shall be kept only in the civilian file. Provided that any child recognized to the court of common pleas, under section 2151.26 of the Revised Code, shall not be exempt from fingerprinting and photographing. In every such case the officer taking such child into custody shall immediately report the fact to the court and the case shall then proceed as provided in sections 2151.01 to 2151.54, inclusive, of the Revised Code."

Section 2151.34 Place of detention for children; district detention homes:

"No child under eighteen years of age shall be placed in or committed to any prison, jail, or lockup, nor shall such child be brought into any police station, vehicle, or other place where such child can come in contact or communication with any adult convicted of crime or under arrest and charged with crime; provided that a child fourteen years of age or older may, for good cause shown, and with the consent of the juvenile judge or a person designated by him, be placed in a place of detention for adults, but in a room or ward separate from adults. All children under eighteen years of age, when confined in such places of juvenile detention, shall not be detained for a period to exceed ninety days during which time a social history can be prepared to include court record, family history, personal history, school and attendance records, and such other pertinent studies and material as will be of assistance

to the juvenile court in its disposition of the charges against such juvenile offenders.

Upon the advice and recommendation of the judge, the board of county commissioners shall provide, by purchase, lease, construction, or otherwise, a place to be known as a detention home, which shall be within a convenient distance of the juvenile court, and not used for the confinement of adult persons charged with criminal offenses, where delinquent, dependent, neglected children, or juvenile traffic offenders may be detained until final disposition. Upon the joint advice and recommendation of the juvenile judges of two or more adjoining or neighboring counties, the boards of county commissioners of such counties shall form themselves into a joint board, and proceed to organize a district for the establishment and support of a detention home for the use of the juvenile courts of such counties, where delinquent, dependent, neglected children, or juvenile traffic offenders may be detained until final disposition, by using a site or buildings already established in one such county, or by providing for the purchase of a site and the erection of the necessary buildings thereon. Such county or district detention home shall be maintained as provided in sections 2151.01 to 2151.54, inclusive, of the Revised Code. In any county in which there is no detention home, or which is not served by such a district detention home, the board of county commissioners shall provide funds for the boarding of such children temporarily in private homes. Children who are alleged to be or adjudged delinquent, dependent, neglected, or juvenile traffic offenders, may, after complaint is filed, be detained in such detention home or certified foster homes until final disposition of their case. The court may arrange for the boarding of such children in certified foster homes or in uncertified foster homes for a period not exceeding sixty days, subject to the supervision of the court,

or may arrange with any county department of welfare which has assumed the administration of child welfare, county child welfare board, or certified organization to receive for temporary care children within the jurisdiction of the court.

In case a detention home is established as an agency of the court, or a district detention home is established by the courts of several counties as hereinbefore provided, it shall be furnished and carried on, as far as possible, as a family home in charge of a superintendent or matron in a non-punitive neutral atmosphere. The judge, or the directing board of a district detention home, may appoint a superintendent, a matron, and other necessary employees for such home and fix their salaries. During the school year, when possible, a comparable educational program with competent and trained staff shall be provided for those children of school age. A sufficient number of trained recreational personnel shall be included among the staff to assure wholesome and a profitable leisure-time activities. Medical and mental health services shall be made available to insure the courts all possible treatment facilities shall be given to those children placed under their care. In the case of a county detention home, such salaries shall be paid in the same manner as is provided by section 2151.13 of the Revised Code for other employees of the court, and the necessary expenses incurred in maintaining such detention home shall be paid by the county. In the case of a district detention home, such salaries and the necessary expenses incurred in maintaining such detention home shall be paid as provided in sections 2151.341 [2151.34.1] to 2151.3415 [2151.34.15], inclusive, of the Revised Code.

In case the court arranges for the board of children temporarily detained in such foster homes, or arranges for such board through any private certified organization, a reasonable sum to be fixed by the court for the

board of such children, shall be paid by the county. In order to have such foster homes available for service an agreed monthly subsidy may be paid and a fixed rate per day for care of children actually residing therein."

Section 2151.35 Informal hearing; procedure; right of child to counsel; disposition:

"The juvenile court may conduct its hearings in an informal manner, and may adjourn such hearings from time to time. In the hearing of any case the general public may be excluded and only such persons admitted as have a direct interest in the case. The juvenile court shall permit a child to be represented by an attorney at law during any hearing before such court and shall extend to such child all the rights and privileges of section 2935.14 of the Revised Code. Such attorney at law, the parents or guardian of such child, and any attorney at law representing them shall be entitled to visit such child at any reasonable time and to be present at any hearing involving the child and shall be given reasonable notice of such hearing.

Any report or part thereof concerning such child which has been prepared by an employee of the court which is used in the hearing and is pertinent thereto shall for good cause shown be made available to any attorney at law representing such child and to any attorney at law representing the parents or guardian of such child, upon written request prior to any hearing involving such child. All cases involving children shall be heard separately and apart from the trial of cases against adults. The court may excuse the attendance of the child at the hearing in cases involving neglected, dependent, or crippled children. The court shall hear and determine all cases of children without a jury. If the court finds that the child is a juvenile traffic offender or is delinquent, neglected, or dependent, it may by order entered proceed as follows:

(A) Place the child on probation, under supervision in its own home, in the custody of a relative, in an institution, or in a certified foster home, wherever situate, upon such terms as the court shall determine; provided that the court may place delinquent children on a free or wage basis in uncertified foster homes. The court shall, at the time of placing the child, determine which school district must bear the cost of educating the child while he is residing at such place as the court directs. The decision of the court concerning the expense of the child's education shall be made a part of the order provided by this section;

(B) Commit the child temporarily or permanently to the division of social administration of the department of public welfare, or to a county department of welfare which has assumed the administration of child welfare, county child welfare board, or certified organization, or to the youth commission or to a county or district training facility created under section 2151.65 of the Revised Code, or to any institution, or to any agency in Ohio or in another state authorized and qualified to provide or secure the care, treatment, or placement required in the particular case;

(C) Impose a fine upon a juvenile traffic offender or a delinquent child not exceeding fifty dollars and costs;

(D) Make such further disposition as the court deems proper;

(E) Commit a male child over sixteen years of age who has committed an act which if committed by an adult would be a felony to the Ohio state reformatory;

(F) Suspend or revoke the operator's or chauffeur's license issued to any minor found to be a juvenile traffic offender;

(G) Suspend or revoke the registration of all motor vehicles registered in the name of any minor found to be a juvenile traffic offender.

Whenever a child commits an act of delinquency before arriving at the age of eighteen years, and the specific complaint thereon is not filed or hearing held until after said child arrives at the age of eighteen years, the court shall have jurisdiction to hear and dispose of such complaint, as if the complaint were filed and hearing held before such child arrived at the age of eighteen years.

The judgment rendered by the court under this section shall not impose any of the civil disabilities ordinarily imposed by conviction, in that the child is not a criminal by reason of such adjudication, nor shall any child be charged or convicted of a crime in any court, except as provided in section 2151.26 of the Revised Code. The disposition of a child under the judgment rendered or any evidence given in the court shall not be admissible as evidence against the child in any other case or proceeding in any other court, except that the judgment rendered and the disposition of such child may be considered by any court only as to the matter of sentence or to the granting of probation. Such disposition or evidence shall not operate to disqualify a child in any future civil service examination, appointment, or application.

Whenever a court commits a child to the division of social administration, the department of public welfare, or to any department, board, institution, or agency it shall transmit with the order of commitment an adequate case history of the child and its family.

With respect to a crippled or otherwise physically handicapped child, who is neither delinquent, neglected, nor dependent, the court may commit the child temporarily to the division or to any agency in Ohio authorized and qualified to provide or secure the care,

treatment, or placement required in the particular case."

Section 2151.38 When jurisdiction of court ceases:

"When a child is committed to the youth commission, or to the Ohio state reformatory, or to the permanent custody of the department of public welfare, or to the division of social administration in said department, or to a county department of welfare which has assumed the administration of child welfare, county child welfare board, or certified organization, the order shall state that such commitment is permanent and the jurisdiction of the juvenile court in respect to the child so committed shall cease and terminate at the time of commitment; except that if the division or any county department, board, or certified organization having such permanent custody makes application to the court for the termination of such custody, the court upon such application, after notice and hearing and for good cause shown, may terminate such custody at any time prior to the child becoming of age. The court shall make disposition of the matter in whatever manner will serve the best interests of the child. All other commitments made by the court shall be temporary and shall continue for such period as designated by the court in its order, or until terminated or modified by the court, or until a child attains the age of twenty-one years."

Section 2151.40 Co-operation required:

"Every county, township, or municipal official or department, including the prosecuting attorney, shall render all assistance and co-operation within his jurisdictional power which may further the objects of section 2151.01 to 2151.54, inclusive, of the Revised Code. All institutions or agencies to which the juvenile court sends any child shall give to the court or to any officer appointed by it such information concerning such child

as said court or officer requires. The court may seek the co-operation of all societies or organizations having for their object the protection or aid of children."

Section 2151.41 Prohibition against abuse of or abetting delinquency of child:

"No person shall abuse a child or aid, abet, induce, cause, encourage, or contribute to the dependency, neglect, or delinquency of a child or a ward of the juvenile court, or act in a way tending to cause delinquency in such child. No person shall aid, abet, induce, cause, or encourage a child or a ward of the court, committed to the custody of any person, department, public or private institution, to leave the custody of such person, department, public or private institution, without legal consent. Each day of such contribution to such dependency, neglect, or delinquency is a separate offense."

Section 2151.42 Prohibition against neglecting or mistreating child:

"No person charged with the care, support, maintenance, or education of a legitimate or illegitimate child or no person being the father of an illegitimate child under eighteen years of age shall fail to care for, support, maintain, or educate such child, or shall abandon such child, or shall beat, neglect, injure, or otherwise ill-treat such child, or cause or allow him to engage in common begging. No person charged with the care, support, maintenance, or education of a legitimate or illegitimate child under twenty-one years of age who is physically or mentally handicapped shall fail to care for, support, maintain, or educate such child. Such neglect, nonsupport, or abandonment shall be deemed to have been committed in the county in which such child may be at the time of such neglect, nonsupport,

or abandonment. Each day of such failure, neglect, or refusal shall constitute a separate offense."

Section 2151.46 Bail:

"Sections 2937.21 to 2937.45, inclusive, of the Revised Code, relating to bail in criminal cases in the court of common pleas, shall apply to adults committed or held under sections 2151.01 to 2151.54, inclusive, of the Revised Code."

Section 2151.47 Jury trial; procedure:

"Any adult arrested under section 2151.01 to 2151.54, inclusive, of the Revised Code, at any time before hearing, may demand a trial by jury, or the juvenile judge upon his own motion may call a jury. Sections 2945.17, and 2945.22 to 2945.36, inclusive, of the Revised Code, relating to the drawing and impaneling of jurors in criminal cases in the court of common pleas, other than in capital cases, shall apply to such jury trial. The compensation of jurors and costs of the clerk and sheriff shall be taxed and paid as in criminal cases in the court of common pleas."

Section 2151.65 Single-county and joint-county juvenile facilities:

"Upon the advice and recommendation of the juvenile judge, the board of county commissioners may provide by purchase, lease, construction, or otherwise a school, forestry camp, or other facility or facilities where delinquent, dependent, or neglected children or juvenile traffic offenders may be held for training, treatment, and rehabilitation. Upon the joint advice and recommendation of the juvenile judges of two or more adjoining or neighboring counties, the boards of county commissioners of such counties may form themselves into a joint board and proceed to organize

a district for the establishment and support of a school, forestry camp, or other facility or facilities for the use of the juvenile courts of such counties, where delinquent, dependent, or neglected children, or juvenile traffic offenders may be held for treatment, training, and rehabilitation, by using a site or buildings already established in one such county, or by providing for the purchase of a site and the erection of the necessary buildings thereon. Such county or district school, forestry camp, or other facility or facilities shall be maintained as provided in sections 2151.01 to 2151.80, inclusive, of the Revised Code. Children who are adjudged to be delinquent, dependent, neglected, or juvenile traffic offenders may be committed to and held in any such school, forestry camp, or other facility or facilities for training, treatment, and rehabilitation.

The juvenile court shall determine:

(A) The children to be admitted to any school, forestry camp, or other facility maintained under this section;

(B) The period such children shall be trained, treated, and rehabilitated at such facility;

(C) The removal and transfer of children from such facility."

Section 2151.99 Penalties:

"(A) Whoever violates section 2151.41 of the Revised Code shall be fined not less than five nor more than one thousand dollars or imprisoned not less than ten days nor more than one year, or both.

(B) Whoever violates section 2151.42 of the Revised Code shall be fined not more than five hundred dollars or imprisoned not more than one year, or both. The juvenile judge may order that such person stand committed until such fines and costs are paid; provided that if he pays promptly to the juvenile court each

week or to a trustee named by such court a sum to be fixed by it for such purpose, sentence may be suspended.

(C) Whoever violates section 2151.421 [2151.42.1] of the Revised Code shall be fined not less than five nor more than one hundred dollars or imprisoned not less than one nor more than ten days, or both."

The Ohio criminal statutes provide in pertinent part:

Section 2901.05 Murder in second degree:

"No person shall purposely and maliciously kill another. Whoever violates this section, except in the manner described in sections 2901.01, 2901.02, 2901.03, and 2901.04 of the Revised Code, is guilty of murder in the second degree and shall be imprisoned for life."

Section 2935.14 Rights of person arrested:

"If the person arrested is unable to offer sufficient bail or, if the offense charged be a felony, he shall, prior to being confined or removed from the county of arrest, as the case may be, be speedily permitted facilities to communicate with an attorney at law of his own choice, or to communicate with at least one relative or other person for the purpose of obtaining counsel (or in cases of misdemeanors or ordinance violation for the purpose of arranging bail). He shall not thereafter be confined or removed from the county or from the situs of initial detention until such attorney has had reasonable opportunity to confer with him privately, or other person to arrange bail, under such security measures as may be necessary under the circumstances.

Whoever, being a police officer in charge of a prisoner, or the custodian of any jail or place of confinement, violates this section shall be fined not less than one hundred nor more than five hundred dollars or imprisoned not more than thirty days, or both."

APPENDIX B

Jurisdictions Providing for Right to Jury Trial in Delinquency Hearings

1. Colorado: COLO. REV. STAT. § 22-8-1 (1963)
2. District of Columbia: D.C. CODE ANN. § 16-2307 (Supp. IV, 1965)
3. Kansas: KAN. GEN. STAT. ANN. § 38-808 (1965)
4. Massachusetts: MASS. GEN. LAWS ANN. ch. 119, § 56 (1958) (trial *de novo* in Superior Court)
5. Michigan: MICH. STAT. ANN. § 27.3178 (598.17) (1962)
6. Montana: MONT. REV. CODES ANN. §§ 10-603, 604 (1957)
7. Nebraska: NEB. REV. STAT. § 43-202 (1960)
8. New Mexico: *Peyton* v. *Nord*, —— N.M. ——, —— P.2d ——, 36 U.S.L.W. 2262 (Oct. 16, 1967)
9. Oklahoma: OKLA. STAT. tit. 10, § 102 (1966)
10. South Dakota: S.D. CODE § 43.0331 (1939)
11. Tennessee: *Doster* v. *State*, 195 Tenn. 535, 260 S.W.2d 279 (1953) (by implication)
12. Texas: VERNON'S ANN. CIV. STAT. art. 2338.13 (Supp. 1967)
13. West Virginia: W. VA. CODE ANN. ch. 49-5-6 (1961)
14. Wisconsin: WIS. STAT. ANN. ch. 48.25 (1957)

APPENDIX C

Jurisdictions Providing for Right to Bail or Pre-Hearing Release Under Prescribed Judicial Standards

I. *Bail by statute or decision:*

1. Arkansas: ARK. STAT. ANN. § 45.227 (1964)
2. Colorado: COLO. REV. STAT. § 22-8-6(3) (1963)
3. District of Columbia: *Trimble* v. *Stone,* 187 F.Supp. 483 (1960)
4. Kentucky: *Smith* v. *McCravy,* 1 Crim. L. Rep. 2153 (Ky. Cir. Ct., May 25, 1967)
5. Louisiana: *State* v. *Franklin,* 202 La. 439, 12 So.2d 211 (1943)
6. Massachusetts: MASS. GEN. LAWS ANN. ch. 119, § 67 (1958)
7. Michigan: MICH. STAT. ANN. § 27.3178 (598.17) (1962)
8. South Carolina: S.C. CODE ANN. § 15-1187 (1962)
9. South Dakota: S.D. CODE § 43.0309 (1939).
10. Vermont: VT. STAT. ANN. tit. 33, § 620 (1958)
11. Washington: WASH. REV. CODE ANN. § 13.04.115 (1962)
12. West Virginia: W. VA. CODE ANN. § 49.5.3 (1961)
13. Wisconsin: *Wisconsin ex rel. Allen Mayberry* v. *Administrator,* Juvenile Court Digest, Vol. 1, No. 2, p. 4 (Wis. Cir. Ct. August 4, 1967)

II. *Jurisdictions recognizing right to prehearing release unless there is judicial determination according to specific statutory criteria for detention:*

14. California: CAL. WELF. & INST'NS CODE § 635
15. Florida: FLA. STAT. ANN. § 39.03 (1961)
16. Hawaii: HAWAII FAMILY CT. ACT § 333.16 (1965)
17. Idaho: IDAHO CODE ANN. § 16-1811(1)(c) (Supp. 1967)
18. Illinois: ILL. REV. STAT. ch. 37, § 703-5 (1965)
19. Indiana: IND. ANN. STAT. § 9-3212 (1956)
20. Iowa: IOWA JUVENILE CT. § 232.16 (Supp. 1966)
21. Minnesota: MINN. STAT. ANN. § 260.171 (Supp. 1966)
22. Mississippi: MISS. CODE ANN. § 7185.06 (Supp. 1966)
23. New York: N.Y. FAMILY CT. ACT § 728
24. Utah: UTAH CODE ANN. § 55-10-91(i) (Supp. 1967)

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1967

No. 701

IN THE MATTER OF
BUDDY LYNN WHITTINGTON.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF OHIO, FAIRFIELD COUNTY.

BRIEF OF THE FLORIDA COUNCIL OF JUVENILE COURT JUDGES

GEORGE R. GEORGIEFF
Assistant Attorney General
State of Florida

Counsel for Amicus Curiae

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1967

No. 701

IN THE MATTER OF
BUDDY LYNN WHITTINGTON.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF OHIO, FAIRFIELD COUNTY.

BRIEF OF THE FLORIDA COUNCIL OF JUVENILE COURT JUDGES

INTEREST OF AMICUS CURIAE

The Florida Council of Juvenile Court Judges does and will continue to have a keen interest in all matters pertaining to juvenile problems, proceedings and rehabilitative assistance. Having a long history of measurable success in the area of juvenile delinquency and its curbing and control, Florida is quite naturally interested in any decisions which may be rendered by this Court regarding proceedings in juvenile courts in Florida dealing with the problems made the object of the petitioner's complaint in this case.

Because of this, the Florida Council of Juvenile Court Judges offers this brief as *amicus curiae* pursuant to the provisions of the rules of this Court, to-wit: Rule 42.4.

SUMMARY OF ARGUMENT

I.

This case presents the question of whether the constitutionally permissible standards of proof in a delinquency proceeding shall be maintained as a predicate for finding guilt rather than an unnecessary elevation to the level currently in use in adult criminal proceedings; that is to say, beyond a reasonable doubt.

To suggest a change in nomenclature would result in fairer judicial conclusions regarding guilt or innocence in delinquency proceedings is to say that this will make the trier of fact better able to divine truth. Yet nothing could be further from the truth. In those cases in which the quantum of evidence is found to be deficient a reversal should and invariably will follow for that reason. If, in the aggregate, that condition exists, what matter that the deficiency resulted from a standard proceeding in existence or one which petitioner hopes this Court will ordain? We submit there is none. We submit no change should be made because none is necessary.

II.

Again there are no reasons evident and none have been found to suggest much less justify a conclusion that a juvenile in a delinquency proceeding will not receive a fair trial unless a jury is afforded him.

Aside from the fact that it would be impossible to provide him with a jury of his peers, there is no basis in the doctrine of equal protection upon which petitioner could rely for a claim that he is entitled to a jury trial.

Admittedly no juvenile judge should be allowed to corner the market on wisdom or a claimed ability to have the answer to all the world's juvenile problems. We fail to see how the addition to a delinquency proceeding of a jury panel would do anything in the world toward attaining the result desired with regard to the treatment to be accorded a delinquent. It is simply a fact finding process which occurs thousands of times every day in every criminal case in which a jury is waived. There is nothing constitutionally offensive about an adult criminal trial in which the facts are decided by the judge. There ought not to be anything offensive about its equivalent in a delinquency proceeding. Indeed, if the judge's findings of fact do not comport with reason and law, who can deny that such findings on appeal would be insured the very shortest of life.

III.

We have no quarrel with petitioner's contention that the warnings made obligatory on law enforcement by this Court's decision in *Miranda v. Ariz.*, 384 U.S. 436, 16 L.ed.2d 694, 86 S.Ct. 1602, ought as well to be extended to the interrogation of juveniles involved in violations of state criminal laws.

IV.

Inherent in the overall pattern of the juvenile court system of this country is the desire to work a result with juvenile offenders

quite unlike that made the object of a criminal proceeding. Much of this is accomplished before the matter ever gets to the hearing regarding his delinquency by the disposition made of the juvenile prior to trial. If he is given the unbridled right to a liberty which he would never enjoy at home, then the controls necessary in many instances would be rendered nugatory. There are truly few instances in which custody is the norm. Release is the rule in far and away the greatest number of instances. To make release on bail a constitutional imperative in delinquency proceedings would be to give the juvenile the least chance at rehabilitation, adjustment, correction or a reassessment of values and responsibilities long found to be desirable by most societies since the dawn of time.

ARGUMENT

PRELIMINARY STATEMENT

Obviously no portion of the argument presented here on behalf of the State of Florida is meant in any way to deal with or interfere with any of the matters peculiar to Ohio's jurisdictional or procedural requirements. Florida's argument is and should be considered only as though all of these matters had been resolved and the ultimate legal questions properly ripened so that this Court could either pluck them from the tree or leave them for another time.

POINT I

Lest it be suggested that except for the adjustments made necessary by this Court's decisions in the cases of *Kent v. U.S.*,

383 U.S. 541, 16 L.ed.2d 84, 86 S.Ct. 1045; and *In Re Gault*, ...US....., 18 L.ed.2d 527, 87 S.Ct....., the procedure by which charges of juvenile delinquency are disposed of is the same as that in criminal proceedings, we quickly advise that nothing could be further from fact. It may safely be said that in no state jurisdiction does a juvenile (within the judicial disposition of his case) receive the same treatment as he would in a full-blown criminal proceeding. It is quite apparent that when this case is decided we all will know whether juveniles must be accorded every measure of protection heretofore determined necessary only in adult criminal proceedings.

Three of petitioner's points may be coalesced to a general principal that the fundamental guarantees of equal protection required the same treatment be accorded him as would have been the automatic due of an adult in a criminal trial.

Both practically and legally, this is an argument so patently unsound that it ought to be sufficient merely to state it to show its unsoundness. Unfortunately, this type of argument and thinking is becoming so common that it perhaps requires some attention.

The decisions are legion that the constitutional requirement of equal protection of the law does not forbid a proper legislative classification of persons or things subject to the law. Many of these decisions deal specifically with the juvenile court statutes in different states. The leading decision, often challenged but still standing after more than sixty years, is *Fisher v. Commonwealth*, 213 Pa. 48, 62 A. 198. 5 Ann. Cas. 92 (1905). There the court says:

> "That minors may be classified for their best interests and the public welfare has never been questioned in the legisla-

tion relating to them. Under the act of 1887, the classification of females under 16 years of age means felonious rape, with its severe penalties for what may be done in one day, though on the next it remains simple fornication, to be expiated by a mere fine. * * * The genus homo is a subject within the meaning of the Constitution. Will it be contended that as to this there can be no classification? No laws affecting the personal and property rights of minors as distinguished from adults? Or of males as distinguished from females! * * * "

This case holds specifically that the legislative classification which establishes different types of procedures for children and adults is constitutionally proper. The case discusses the problem in considerable detail, pointing out numerous other areas of legal classification in which persons of different ages, sexes, or occupations have different rights and duties, or are subject to different penalties or impositions.

The only constitutional requirement in the past has been that the classification be a reasonable one in relation to the persons or things classified, and the objects to be accomplished by the legislation.

In respect to the juvenile court laws, the reasonableness of the classification which separates children from adults ought to be clear upon its face, but in a society such as ours, in which the biological facts are blurred or obscured by poor thinking and improper social customs, perhaps it requires demonstration.

From time immemorial, legal codes have made distinctions between adults and children. The Code of Hammurabi, the earliest surviving body of laws, makes such provision. So does the Code of Justinian. *In re People on Behalf of Syson*, 184 Cal.

App.2d 111, 7 Cal. Rptr. 298 (1960). In England, from which our law derives, the Laws of Athelstane, in the Fourth Century, provided special treatment for children. Rappeport, *Determination of Delinquency in the Juvenile Court: A Suggested Approach,* 1958 Wash. U. L. Q. 123, 128.

Perhaps it would be justifiable to depart from precedents, even from a series so ancient in origin, if the reasons for them have ceased to exist, but the reason for these precedents is presently as valid as it has ever been. As one author expressed it (Young, *The Constitution and the Juvenile Court-Letter or Spirit,* 44 J. Am. Jud. Soc'y 93, 97 (1960)):

> "Some of the vociferous critics of the juvenile courts seem to forget what the wise parent knows, for example, that children really are not adults. They do not come to life fully equipped with knowledge and wisdom, like Minerva springing full-panoplied from the brow of Jove. They are not like insects which are hatched complete with all the instincts they need to complete their life cycle. On the contrary, human children start life completely helpless and must come to the rights and privileges of adulthood by slow degrees."

See also, Kennick, *Where Have We Gone Wrong?* THE BLADE, Toledo, Ohio, September 11, 1966, § G at Col. 4, which reads in part as follows:

> "Immaturity is the natural condition of childhood. Unfortunately, many modern parents have come to look upon this condition as bad. They cannot bear to see a child as a child. There is a growing social force which dictates that he must be turned into an adult right away * * *"

It is not difficult to see in this failure to recognize that there is a real difference between children and adults the explanation of much of the difficulty which underlies our present problems of delinquency and youth crime. If a child is to be accorded all the rights and privileges of adulthood, what necessity is there for the child to mature? Adults who are themselves immature children who have never had to grow up, are unabe to lead their own children to maturity in a vicious circle which is nowhere so apparent as in the juvenile courts.

There is further reason why the classification which makes constitutional the juvenile court laws must logically be permitted to stand. That reason is that if it is unconstitutional to provide separate procedures for children who are accused of crime, it is equally unconstitutional to place them under the disabilities of minority for any other purpose, since the same legal and factual bases underlies all clasifications. The right to vote, the right to operate a motor vehicle, the right to marry, the right to purchase and use intoxicating beverages, the right to engage in any occupation, are all governed, in every state, and in the United States, by the factor of calendar age. Equally, the obligations of compulsory education and military service are governed by age.

Since this Court has recently recognized that it is proper to distinguish between children and adults, by referring to "the commendable principles relating to the processing and treatment of juveniles separately from adults" *In re Gault*, supra, and the child's right to be proceeded against in the juvenile court, *Kent v. U.S.*, supra, we ask this Court to overrule the petitioner's broad contention in his questions presented that the juvenile court statutes involved which are not identical with criminal statutes deny him the equal protection of the law.

Perhaps the least critical of petitioner's arguments is the one in which he claims a denial of due process as well as equal protection because the finding of delinquency was based upon an impermissible standard of proof, to-wit: a preponderance of the evidence. Petitioner opts for a rule from this Court that to require any less in a juvenile proceeding than proof beyond a reasonable doubt such as is automatically the basis in an adult criminal proceeding, denies him equal protection without any cognizable reason therefor and due process even if there seems to be a reason.

Obviously, as we have said *ante*, there are innumerable reasons, most of which were acknowledged by this Court in *Kent*, supra, and *Gault*, supra, to classify juveniles differently from adults charged with a crime. Accepting that predicate and assuming that the disposition made of a juvenile in a delinquency proceeding must be swift if the hoped for cure is to work, can it be said that an extensive network of disproportionate guardrails be erected around him in order to insure that he be given the treatment?

It almost seems idle to suggest that a preponderance of the evidence is a sufficient standard of proof in a juvenile proceeding as a general rule [see 31 *Am. Jur.2d*, Juvenile Courts, 339 (1967)] since that salutary pronouncement is here challenged. Admittedly, the day after a bad decision is not soon enough to reverse it. See *Gideon v. Wainwright*, 372 U.S. 345, 9 L.ed.2d 799, 83 S.Ct. 792.

The question redounds: Why is a preponderance of the evidence less to be desired in terms of due process or equal protection than proof beyond a reasonable doubt? Oh, it is a temptation to suggest that any fool would know the difference yet it

is respectfully submitted that there is precious little, if indeed any, difference except perhaps in nomenclature. In passing, we observe that when this Court rendered its decision in *Gault*, supra, it did not seem perturbed with the precise matter although Arizona's Supreme Court had held that proof by clear and convincing evidence was appropriate in a delinquency proceeding.

As will be demonstrated post, only a handful of jurisdictions either permit or require juries in juvenile proceedings. At least until this Court disposes of the petitioner's case, it may accurately be said that far and away the greatest number of delinquency proceedings are heard exclusively by a juvenile judge and not a jury. We do not think it unfair to conclude that proof beyond a reasonable doubt (as in a criminal case) is a cautionary instruction to a jury that they shall not cavalierly condemn one charged with crime to penal servitude and a lifetime brand. We do not instruct judges. We instruct juries. Lay juries must be instructed because they are not privy to the law. Judges are the oral arm of the law, nay, they are the law. Would it not follow that a juvenile whose delinquency charge is to be heard by a juvenile judge must measure his entitlement to a different standard of proof against an adult charged with crime who waives a jury trial and has his case heard by the judge alone? Is there any difference between the standard of proof employed by the juvenile judge in that case and the judge in the criminal case? We submit there is not a trace of difference.

No thinking individual would deny that a judge in a delinquency proceeding hearing the case *nisi* would consider it just as inadequate, or, as the case may be, adequate without regard to the standard of proof allegedly required. He, being trained in the law and habitually sitting as both the trier of the fact and

the trier of the law will consider the evidence adduced as either proving delinquency or not proving it as the case may be. If there is any measurable differences between the two (2) standards, we submit it is only one which finds its way to a jury to insure that their lay views do not replace reason.

Just what is it we are talking about? We respectfully submit that the object of the controversy in this point is what will an appellate court, reviewing a finding of delinquency, consider to be an appropriate basis upon which to either affirm or reverse that finding.

Counsel is now assured in delinquency proceedings—*In Re Gault,* supra.

Confrontation of witnesses is now assured in delinquency proceedings—*In Re Gault,* supra.

Appeals are now assured from delinquency proceedings—*In Re Gault,* supra.

Many of the facets of due process are or will be assured in delinquency proceedings so that there seems to be no deficiency in that regard, at least at this writing. Let us therefore assume that this Court could be prevailed upon to order that the burden of proof be elevated from that of a preponderance to one of a reasonable doubt. Would it then follow that any appellate court in the land would be more likely to affirm a finding of delinquency simply because the nomenclature of the fact finding process had been changed? Or is it now a fact that appellate courts throughout the land are less inclined to affirm simply

because the nomenclature of the fact finding process has not yet been changed? Would it follow that fewer cases would be reversed if the delinquency finding was one made ostensibly under some magic phrase called beyond a reasonable doubt? We think not. Judges of juvenile courts make findings of fact which, in their best judgment, satisfy them that the charge of delinquency has been proved. It is that finding, however reached which is up for review whenever an appeal therefrom is taken. If the finding is unsupportable, it is reversed not because it was not made as a result of proof beyond a reasonable doubt but rather because it is one which the appropriate appellate court simply feels could not have been reached based upon the quantum of evidence. This would not change no matter what the burden of proof was designated. All appellate courts do when they consider the sufficiency of the evidence with regard to a finding of delinquency is to decide whether, taken in its best light, there has been a sufficient showing to satisfy the finding. It could not matter at all that that sufficiency wears one name in one proceeding and a different one in another. It is just as adequate or as the case may be, deficient, no matter what you call it.

It seems apparent that what petitioner seeks is a useless addition which would lend nothing whatever to the proceedings that were calculated to insure treatment which does not run afoul of due process. Believing that, one should wonder at just what, if anything, it could possibly add to a delinquency proceeding.

POINT II

Here we take no issue with so much of petitioner's argument as directs itself to the alleged over participation of the trial judge in his case, leaving that to the litigants. We will instead

address ourselves to the second portion of his argument, that is to say that he should have been afforded a jury trial.

In *Palko v. Conn.*, 302 U.S. 319, 82 L.ed.288, 58 S.Ct. 149, the Supreme Court, speaking through Justice Cardozo, in rejecting the proposition that those rights secured by the Bill of Rights were made applicable to the states by operation of the Fourteenth Amendment, stated, at page 291:

> "* * * The Sixth Amendment calls for a jury trial in criminal cases and the Seventh for a jury trial in civil cases at common law where the value in controversy shall exceed twenty dollars. *This court has ruled that consistently with those amendments trial by jury may be modified by a state or abolished altogether.* * * *" (Citations omitted) (Emphasis supplied)

Justice Cardozo, in his opinion, pointed out that some provisions of the Bill of Rights had been made applicable to the states while others had not. Justice Cardozo explained this inconsistency in the following manner:

> "The line of division may seem to be wavering and broken if there is a hasty catalogue of the cases on the one side and the other. Reflection and analysis will induce a different view. There emerges the perception of a rationalizing principle which gives to discrete instances a proper order and coherence. *The right to trial by jury and the immunity from prosecution except as the result of an indictment may have value and importance. Even so, they are not of the very essence of a scheme of ordered liberty. To abolish them is not to violate a 'principle of justice so rooted in the traditions and conscience of our people as to be ranked as*

fundamental". Snyder v. Massachusetts, supra (291 U.S. p. 105, 78 L.ed. 677, 54 S.Ct. 330, 90 A.L.R. 575); Brown v. Mississippi, supra (297 U.S. p. 285, 80 L.ed. 686, 56 S.Ct. 461); Hebert v. Louisiana, 272 U.S. 312, 316, 71 L.ed. 270, 272, 47 S.Ct. 103, 48 A.L.R. 1102. Few would be so narrow or provincial as to maintain that a fair and enlightened system of justice would be impossible without them. * * *" 302 U.S. 319, 325, 82 L.ed. 288, 292, 58 S.Ct. 149. (Emphasis supplied)

So far as can be ascertained by this writer, this Court has never receded from this position, notwithstanding this Court's recent pronouncements in regard to the right to counsel, *Gideon v. Wainwright*, 372 U.S. 335, 9 L.ed.2d 799, 83 S.Ct. 792 (1963), the right to confrontation, *Pointer v. Texas*, 380 U.S. 400, 13 L.ed.2d 923, 85 S.Ct. 1065 (1965), and the right to compulsory process. *Washington v. Texas*, ...U.S....., 18 L.ed.2d 1019, 87 S.Ct. .....(1967).

In the last referred to case, Justice Warren, speaking for eight (8) members of the Court, said in regard to the Sixth Amendment and its application to the states:

"* * * At one time, it was thought that the Sixth Amendment had no application to state criminal trials. That view no longer prevails, and in recent years we have increasingly looked to the *specific guaranties* of the Sixth Amendment to determine whether a state criminal trial was conducted with due process of law. We have held that due process requires that the accused have the assistance of counsel for his defense, that he be confronted with the witnesses against him, and that he have the right to a speedy and public trial.

"The right of an accused to have compulsory process for obtaining witnesses in his favor stands on no lesser footing than the other Sixth Amendment rights that we have previously held applicable to the States. This Court had occasion in In re Oliver, 333 U.S. 257, 92 L.ed. 682, 68 S.Ct. 499 (1948), to describe what it regarded as the most basic ingredients of due process of law. It observed that:

"'A person's right to reasonable notice of a charge against him, and an opportunity to be heard in his defense—a right to his day in court—are basic to our system of jurisprudence; and these rights include, as a minimum, a right to examine the witnesses against him, to offer testimony, and to be represented by counsel.' 333 U.S., at 273, 92 L.ed. at 694 (footnote omitted).

"The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law." 18 L.ed.2d 1019, 1022, 1023.

The rights which have been regarded as essential to a fair determination and therefore essential to due process have all been those rights which insure or provide complete access to the facts and which provide that the trier of the facts will hear both sides of the issue. This is proper and necessary because regardless of who determines the innocence or guilt of the accused, the judgment will only be fair and just if all the facts are presented to

it. Or stated another way, if the trier of the facts, be he judge or jury, has only heard one side of the issue, material facts being kept from them, can their judgment be fair? Can it be said, however, that a person has not been accorded a fair hearing because he was judged by one person rather than six? Assuming an accused has been accorded every opportunity to present the facts to the trier, can it be said that because a judge, rather than a jury, decided the matter, the accused did not obtain a fair and just determination?

It is submitted that this distinction is controlling. Furthermore, it explains why the right to indictment by a grand jury has not been made applicable to the states by virtue of the Fourteenth Amendment. *Blakesley v. Crouse* (10 Cir. 1964), 332 F.2d 849, cert. den. 379 U.S. 949. See also, *Saunders v. Buckhoe,* (6 Cir. 1965), 346 F.2d 558; *Beck v. Washington,* 369 U.S. 541, 8 L.ed.2d 98, 104, 82 S.Ct. 955; and *Hurtado v. Calif.*, 110 U.S. 516, 28 L.ed. 232, 4 S.Ct. 111.

As has been pointed out herein above, counsel for petitioner has cited no authority which specifically holds that the due process clause of the Fourteenth Amendment requires the state to afford an accused a right to trial by jury. The reason, of course, is because no such authority exists! In fact the unanimous authority is to the contrary. *Palko v. Conn.*, supra; *Fay v. New York,* 332 U.S. 261, 91 L.ed. 2043, 67 S.Ct. 1613 (1947); *Irvin v. Dowd,* 366 U.S. 717, 6 L.ed.2d 751, 81 S.Ct. 1639 (1961); *Lane v. Warden, Maryland Penitentiary* (4 Cir. 1963), 320 F.2d 179; *U.S. ex rel. Silva v. Commonwealth of Penn.* (D.C.E.D. Penn. 1961), 196 F.Supp. 51; *Ex Parte Whistler* (D.C.E.D. Wis. 1945) 65 F.Supp. 40; *New Jersey Chiropractic Ass'n v. State Board of Medical Examiners* (D.C. N.J. 1948), 79 F.Supp. 327; *Martin v. State,* S.Ct. Ark. 1948, 211 S.W.2d 116.

Although *Kent v. United States*, supra, and *In Re Gault*, supra, have introduced into the juvenile court some of the traditional trial court procedures and safeguards which adult defendants enjoy, it would be a fallacious interpretation of these cases to contend that this Court now requires juveniles to be treated exactly as adults. While the *Gault* decision, supra, did not address itself specifically to the question of right to jury trial for juveniles, there is language in the majority opinion to the effect that the Court did not intend to bring in all Sixth Amendment rights by implication along with those due process elements expressly enumerated. The Court quotes from its earlier opinion in *Kent*, supra, where it was said:

> "'We do not mean . . . to indicate that the hearing to be held must conform with all of the requirements of a criminal trial or even the usual administrative hearing; but we do hold that the hearing must measure up to the essentials of due process and fair treatment.'" 383 U.S. at 562.

> "We reiterate this view, here in connection with a juvenile court adjudication of 'delinquency,' as a requirement which is part of the Due Process Clause of the Fourteenth Amendment of our Constitution." 387 U.S. at 30.

This Court in *Gault*, supra, thus appears to be attempting a balance between the better aspects of juvenile and adult criminal procedure, and not obliterating all distinctions between the two.

Despite the fact that no federal decisions have held jury trials mandatory in juvenile proceedings, clearly the states have the right to utilize a jury as the finder of fact. However, most states have not seen fit to do so. In the Task Force Report on Juvenile Delinquency and Youth Crime, prepared as an augmen-

tation to the 1967 general report of The President's Commission on Law Enforcement and Administration of Justice, it is stated at page 38:

> "Most States do not provide jury trial for juveniles. Even Illinois, New York, and California, which have recently revised their juvenile court laws to increase procedural safeguards for the child, have not extended the right to trial by jury. There is much to support the implicit judgment by these states that trial by jury is not crucial to a system of juvenile justice.

As this report has suggested, the standard should be what elements of procedural protection are essential for achieving justice for the child without unduly impairing the juvenile court's distinctive values.

> "As has been observed, 'A jury trial would inevitably bring a good deal more formality to the juvenile court without giving the youngster a demonstrably better fact-finding process than trial before a judge.' " (Quoting from Paulsen, "Fairness to the Juvenile Offender," 41 Minn. L. Rev. 547, 559, 1957).

When the uniuqe functions of a juvenile judge are considered, it is apparent that the addition of a jury to the proceedings well might impair the court's effectiveness as a rehabilitative influence upon the child before it, as well as not affording a better fact-finding process, for the judge in a juvenile court is much more than a trier of fact. He has the delicate task of communicating and relating to the child, establishing rapport with him, so that the child will be receptive to the court's efforts in deterring an anti-social adult life, and will have his behavior patterns permanently altered.

What, if anything, shall we decide about the really pointed question of how we provide a juvenile with a jury of his peers? Certainly no one among us would argue with the proposition that the peers of a juvenile are not permitted to serve on juries. Admittedly, the juvenile is not to have friends on his jury. *Hoyt v. Fla.*, 119 So.2d 691, aff 368 U.S. 57, 7 L.ed.2d 118, 82 S.Ct. 159. Just as surely it would be quite wrong to have adults sit in judgment of a youthful offender when all their collective histories would either auger for or marshal against the activities charged. Is this a better method of arriving at fact than that which currently exists? Not hardly. It has not been a critical ingredient to due process. It is not now a critical ingredient of due process. Hopefully this Court will agree that it ought never to become one.

POINT III

Florida's position ever since the return of this Court's decision in the case of *Miranda v. Ariz.*, 384 U.S. 436, 16 L.ed.2d 694, 86 S.Ct. 1602, has been to advise all levels of law enforcement that its mandates were of equal applicability when a juvenile was found in the circumstances contemplated by *Miranda*, supra. While it might be true that the precepts of Miranda, supra, would not necessarily be required in a purely juvenile proceeding either on the matter of dependency or delinquency, there is no way in which an interrogating officer could know before hand that this would follow rather than an order binding the juvenile over for trial as an adult. Therefore a confession unleavened by Miranda's warnings would, at least in those instances, be completely valueless. Florida has no quarrel whatever with a proposition which would extend Miranda's protective pale to juvenile's being interrogated under the circumstances enumerated therein.

POINT IV

Here petitioner would seek the aid of this Court of placing him in a position comparable to that of an adult charged with a crime—with regard to being released on bonded bail or some other form of pre-hearing release.

We must assume that he considers himself to be entitled to the same degree of liberty to which an adult would be entitled were it not for his pretrial restraint. Obviously there can be no question that under most state laws anyone charged with a crime less than capital where the proof is evident and presumption great, is entitled to bail pending trial. It well may be that with the decision in this case will come a definitive recitation of whatever factors may be said to insure bail as a federally assured constitutional right or indeed the more preferable, that there is no federally assured right to bail.

An adult charged with a crime is free to roam the perimeters of this earth if that be his pleasure, certain in the knowledge that his only obligation (if he cares to meet it) is to answer the call of the court. Does a juvenile, whether he be charged with an act of delinquency or otherwise, have the right to go to Ogden, Utah, or Taos, New Mexico, or Monon, Indiana, or indeed anywhere else as a matter of right? Is it not really a case of a juvenile being entitled to custody rather than liberty? If he has parents who are living and are fit and able as custodians, they and they alone shall, in ordinary circumstances, limit his activities and geographical wanderings. If he is charged with an act of delinquency and is released on bail, how does he manage to gain that degree of liberty to which he would not be entitled if he had not run afoul of the law? Do we not give him more under petitioner's position here than any juvenile has ever

had as a matter of right from interested and feeling parties or lawful custodians?

Speaking for Florida (see Chapter 39, Florida Statutes) and indeed for most, if not all, other jurisdictions, it must be obvious that the detention of a juvenile charged with an act of delinquency is far and away the exception rather than the rule. It is in only the most stringent of circumstances that a juvenile judge will order a juvenile to be held rather than released. If bail becomes an ingredient of a transferred due process in juvenile proceedings, then indeed in all those instances in which a juvenile judge could have initiated a desirable pretrial release to the parents (as is almost overwhelmingly the case throughout the land), he would then have to yield that right, surrender the juvenile to either a bail bondsman or to some other custodian found acceptable in the circumstances. If it is a bondsman, certainly there can be no doubt that a person so situated is indeed, in a marked degree, at the mercy of his bondsman who may, whenever it suits his fancy, surrender the principal. It is certain that parents who now receive the custody of their accused child will continue to behave with much more compassion and charity toward their offspring.

Relatively little has been said in courts of law regarding bail for juveniles in delinquency proceedings. The cases in which it has been discussed are as follows: *State v. Franklin*, 202 La. 439, 12 So.2d 211 (1943); *Trimble v. Stone*, 187 F. Supp. 483 (D.D.C. 1960); *State ex rel. Peaks v. Allaman*, 115 N.E.2d 849 (Ohio App. 1952); *Ex parte Cromwell*, 232 Md. 305, 192 A.2d 775 (1963); *Application of Jacobsen*, 278 App. Div. 945, 104 N.Y.S.2d 949 (1951).

Since the authorities set out above are rather evenly split, it seems clear that the matter, as it may be treated here, will liter-

ally be a first impression writing since neither of the decisions turned on a federally assured right to bail in a state court juvenile proceeding.

Under Florida law a juvenile has no right to bail when he is processed in a juveaile court upon a charge of delinquency, but, as we have said, seldom if ever is he detained. See Section 39.03, Florida Statutes, which delineates the limited instances in which the child is to be held in custody. There are comparable statutory provisions throughout the several states which approximate the same result either to a greater or lesser degree. To make it a matter of right rather than the sound discretion which for many, many years has proved to be more than a satisfactory disposition of an accused juvenile, would amount to judicial overkill. It would destroy what well may be the healthy situation of a sensitive and feeling juvenile judge whose concern is and should be to see that the normal surroundings of the juvenile can remain relatively undisturbed and free of outside influences while at the same time marshalling the forces available to reach an intelligent conclusion regarding guilt and making an appropriate disposition of the matter thereafter. If bail is imposed as a matter of right, who can deny that a juvenile judge would be required not only to set it or its conditions but as well to release the juvenile when it well might be in the best interest of the child to have been kept in some form of non-parental custody. Indeed, if bail, in its pure form, were required as a constitutional imperative, the child might be released to a bondsman rather than to his parents. The illustrations of possible incongruity are almost limitless if bail or prehearing release is ordained as a matter of an Eighth Amendment right.

To the detractors who urge, by a parade of the horribles,

that it is unconscionable to tolerate admitted excesses in some instances, we shout most loudly that there is a swift and sure remedy for such excesses—the grand writ of *habeas corpus* before whom all custodians must answer on the court's demand. It stands as the bulwark against those few tyrants who would cloak themselves with judicial raiment.

Obviously the discretion vested in a juvenile judge regarding the prehearing disposition of a juvenile in his court is considerably broader than that of a judge of a criminal court who, in most instances, must release one charged with crime on bail if an acceptable arrangement is made. But we are not dealing with individuals charged with a crime nor are we concerned with restoring an adult human to his state of liberty. If anything, we are making an intelligent assessment of just which custody would best suit the needs of juveniles prior to the time that their case is to be heard. Adults have no need which courts feel constrained to protect as juveniles do. Indeed the needs number in the dozens and as often as not if the juvenile court were not there to see to them, they would go untended and perhaps work irreparable damage to a process which our best minds have concluded is the best they know how to structure. Bail only insures liberty—it makes no provision for the needs of a juvenile, As we have said before, a juvenile, unlike an adult, has no right to liberty but only to modified custody. Admitting this, does it not follow that if a form of custody is the net result of his release that bail in its pure sense or indeed in a modified form, would fly into the teeth of that salutary principle. If he is to be as free as we think of an adult being free on bail, who will there be to answer to his needs as he goes blithely on his way knowing full well that each and every time he may be arrested he has but to arrange for his release and go laughingly on his way again. A delightful prospect

for most juvenile delinquents in their day and time but a monstrous well from which springs all sorts of creatures, moods and behavioral miasmas which will surely rise up to plague him when that happy (?) time has passed?

This Court found in *Kent v. U.S.*, supra, that no juvenile court acts, however well intended, could confer a license for arbitrary procedure. Indeed, they never would. We doubt that any do. With appellate review now assured by *Gault*, supra, anything arbitrary is surely guaranteed a brief existence. In point of fact any of the excesses proscribed both in *Kent*, supra, and *Gault*, supra, should be easily laundered on appeal in light of those two cases.

We ask about the situation which often prompts a delinquent hearing—the parents genuinely feeling themselves unable to handle an allegedly incorrigible child. Whatver their deficiencies as parents, they have at least recognized the fact that some action must be taken with regard to their offspring. In their genuine concern, are they to be denied the inalienable right of control they have over their child only to see it turned over to a stranger before a court can decide, after a hearing, what is best for that child? If that concern, born of love for their child, though not buttressed by their ability to rear it well, is not to be relegated into the dim recesses of the past, we must not set him free to roam without direction or control.

CONCLUSION

Those things most vigorously argued for here by petitioner if ultimately given others by this Court, would do little more than cloak them with the facade of due process which even if

meticulously followed, would do nothing more than diminish the helpful and beneficial treatment received in the juvenile courts of this land.

To liken the proceedings to those in a criminal court is to turn one's head away from the obvious differences.

The criminal court has two obligations, first, to see that no one is improperly convicted of a crime or offense, and second, to impose condign punishment upon those who are, by due process of law, found guilty of a violation of law. No one disputes that a juvenile court has the first of these obligations also, but there is another, and at least equally important, obligation upon the juvenile court, that is, to endeavor to turn each child in trouble into a useful and productive adult. An undue insistence on procedural matters has a strong tendency to defeat this last obligation.

> "While the criminal court exists to convict the guilty, the juvenile court exists to protect and correct them. Whenever the juvenile court must also convict, it is in danger of defeating its main purpose. To help the child change his attitude, a 'clean breast,' a confession, is a primary prerequisite, a *sine qua non*. Otherwise the court would be trying to help the child build his new life on a foundation of falsehood and deceit, like building his house on sand instead of the rock of truth and honesty. Of course, if the child should happen to be innocent, the court couldn't touch him and it wouldn't try to. If he happened not to be, but still maintained he *was* innocent, the court might as well *not* try. At least that's what end results seem to indicate." Alexander, *Constitutional Rights in Juvenile Court*, 46 A.B.A.J. 1206, 1208 (1960)

This Court has said that:

> "Under our Constitution, the condition of being a boy does not justify a kangaroo court." *In Re Gault*, 387 U.S. 1, 28 (1967).

There will perhaps never be a better time to make an intelligent assessment of the advisability of implementing as constitutional mandates three (3) key requirements which will never help to make a boy a man. To simply tap him with a wand of extended due process when all reason indicates a contrary course should be followed, would be no better than to provide him with a straw hat in a blizzard. He needs help within the existing framework of due process articulated so well in *Gault*, supra. To give him what petitioner here suggests is absolutely vital would not even come close to providing him with a better chance—indeed there is every reason to believe that it would hamper courts in the process.

WHEREFORE, this Court is respectfully requested to give such consideration as it feels appropriate to the matters argued and the several positions taken in this brief.

Respectfully submitted,
Florida Council of Juvenile Court Judges
as Amicus Curiae

By: _____

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. 701

IN THE MATTER OF BUDDY LYNN WHITTINGTON
ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF OHIO,
FAIRFIELD COUNTY

BRIEF FOR THE RESPONDENT

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BRIEF FOR THE RESPONDENT

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. 701

IN THE MATTER OF BUDDY LYNN WHITTINGTON
ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF OHIO,
FAIRFIELD COUNTY

STATEMENT OF THE CASE

On July 29, 1966, and prior thereto, the deceased, Gladys Willard, her husband, Herman Willard, and their son, Jack Willard, lived at 220 Fremont Street in the Village of Baltimore, Ohio. Buddy Lynn Whittington, an alleged delinquent child, lived with his parents, O. A. Whittington and Ollie Mae Whittington, across the street from where the Willards lived. The Whittingtons had been close friends of the Willards and associated frequently, especially Mrs. Whittington and Mrs. Willard.

On the morning of July 29, Mrs. Willard and Mr. Willard had breakfast at approximately the hour of 5:45. Their breakfast consisted of corn flakes for Mr. Willard and a dry wheat cereal for Mrs. Willard. Mr. Willard then went to his work at the farm of Adam Poff. He was to be at work at 6:00 A.M., and he had only a mile or so to go to his work. Herman Willard remained at his work and did

not return home until sometime in the afternoon of the 29th and after he had been notified that his wife, Gladys Willard, was missing.

Jack Willard, who was then living with his mother and father at 220 Fremont Street, Baltimore, Ohio, was employed at the Defense Construction Supply Center, formerly called Columbus General Depot, in Columbus, Ohio, and he was required to be at work at 7:45 A.M. On the morning of July 29, he arose about 6:20, had a cup of coffee for breakfast, and left for work at approximately 6:50. When he left for work, his mother, Gladys Willard, was talking to her sister, Mrs. Anderson, on the phone. He arrived at his place of employment at approximately 7:45 and remained there all day until approximately 3:30 P.M., when he left to come home after he had been notified that his mother was missing.

Gladys Willard had made arrangements to pick up her sister, who lived with her mother on Route 204, at approximately 10:00 to 10:30 A.M., and go shopping with her in the City of Lancaster, Ohio.

At approximately 7:30 A.M., O. A. Whittington and Ollie Mae Whittington, father and mother of Buddy Lynn Whittington, had gone to Canton, Ohio, to spend the day with some relatives and had left their son, Buddy, at home, as he was going to school. At approximately 8:00 A.M., Buddy Whittington said that Mrs. Gladys Willard came to the back door of the Whittington home to return some hair curlers which Mrs. Whittington had used in setting Mrs. Willard's hair the previous evening. Mrs. Willard was never seen alive after this time.

When Mrs. Lula Willard, who lives at 226 Fremont Street, Baltimore, Ohio, and who was the daughter-in-law of Gladys and Herman Willard and who lived immediately north of Gladys and Herman Willard, went to the home of

Mrs. Willard at 20 minutes till 9:00 on the morning of July 29 to talk to Mrs. Willard about buying a pair of pajamas for her little girl when Mrs. Willard went shopping, she could not find Mrs. Willard at home at that time, but her car was parked in the driveway. At about 10:00 o'clock A.M., she again went to the home of Mrs. Willard; and she was not there. At about 11:45 she sent her daughter over to see if Mrs. Willard was home, and she was not there at that time although the car was still in the driveway.

At approximately 20 after 12:00 to 12:30 P.M., on said date, Mrs. Aurallia Goodrich, sister of Mrs. Willard, came to the home of Mrs. Willard looking for her, as she had been unable to contact her by phone. She searched through the house and, being unable to find Mrs. Willard, went across the street to the Whittington residence to inquire as to her whereabouts. Buddy Lynn Whitttington came to the door and told Mrs. Goodrich that Mrs. Willard had been over there that morning and brought some curlers back. Mrs. Goodrich asked Buddy where Mrs. Willard usually went berry picking, and Buddy told her that Mrs. Willard usually went berry picking with Mrs. Estep and showed Mrs. Goodrich where Mrs. Estep lived. Mrs. Goodrich, her husband, and Mrs. Estep searched for Mrs. Willard in the fields, Buddy Lynn Whittington later joining in the search, where Mrs. Willard usually picked blackberries, all of that afternoon. They were later joined by Elwood Phillips, Chief of Police of Baltimore, other relatives of Mrs. Willard, Boy Scouts, and others who searched for Mrs. Willard until dusk.

Mr. O. A. Whittington and his wife returned home at approximately 7:30 on the same evening and at that time learned that Mrs. Willard was missing. When he returned home, he could not find the key to his house as it was not in the place where it was usually kept he went to the school

house where Buddy was playing baseball, and Buddy came home with him, got the key and went in the house with his parents. A short time after this, Mr. Whittington went back into his home and searched his house and garage for Mrs. Willard and failed to find her. A few minutes after this, he realized that he had not looked under the beds in his home; so he went back in the house and when he looked under the bed of Buddy Lynn Whittington, he found the body of Mrs. Willard under the bed. The body of Mrs. Willard was not visible unless a person bent over sufficiently to see under the bed. After finding the body of Mrs. Willard, the police and sheriff's office were notified. The coroner came, examined the body and ordered the body into University Hospital for autopsy. Investigation disclosed that Mrs. Willard had gone to the Whittington home and talked to Buddy Lynn Whittington at approximately 8:00 o'clock that morning, that she had not been seen since that time until her dead body was found. That on that date, Buddy Lynn Whittington did not go to school, giving the reason that he had an upset stomach disorder of some kind and that he had not left the house after his mother and father had left at approximately 7:30 until about 30 minutes after Mrs. Goodrich had come to the Whittington home to inquire about her sister, Mrs. Willard, at approximately 12:30 P.M.

The coroner testified that he examined the body of Mrs. Willard at approximately 8:45 P.M., and that the woman had been dead approximately 12 hours prior to that time, but over 11 hours, and that she had remained in the position where the body was found for that number of hours, that the cause of death was homicide by strangulation.

Dr. Cuppage testified that he performed the autopsy on the body of Mrs. Willard and that the cause of death was asphyxiation due to strangulation. That there was hemorrhage, hematoma within the soft connective tissues of the neck; fractures of the hyoid bone, hyperema and dilation

of the blood vessels in the upper portions of the trachea and the esophagus; hemorrhage in the scalp, below the scalp, and in the scalp overlying the skull. That Mrs. Willard had suffered fractures of the right third, fourth and fifth ribs and left sixth rib. Dr. Cuppage testified that examination of the contents of the stomach disclosed about 50 cc's of partially digested food and that this consisted of almost completely digested vegetable fibers and that this food had been eaten from one and one-half to three hours prior to the time of death.

When the body of Mrs. Willard was found on the evening of July 29, 1966, she was on her back with her head toward the foot of the bed. Her dress was pulled up around her waist and her panties and the garter-belt had been pulled down. Her eye glasses, lower set of teeth, her hair net and shoes were close to the body. The room in which she was found was approximately 8′ by 11′ and the body could not be seen unless one bent over so that they could see under the bed. She was under that portion of the bed nearest to the north window in the room and on the opposite side from the doorway to the room. The coroner testified that he examined the body of Mrs. Willard at approximately a quarter till nine p.m. on July 29, 1966, and that at that time, he found that most of the body heat had been lost from the body. The arms were cold, and the torso still had some heat but there had been considerable loss of heat. Post-mortem rigidity was complete. Post-mortem lividity was quite marked. That he estimated, based upon examination of the body that she had been dead approximately twelve hours. The coroner further testified that she had been in the same position, on her back approximately twelve hours and that the cause of death was homicide by strangulation.

On the evening of the 29th day of July, after the body of Gladys Willard had been removed from the Whittington home, Buddy Lynn Whittington, as well as his parents, and

in the presence of his parents and one other person believed to be a relative, was talked to by the Juvenile Probation Officer, Dan Berry, Deputy Sheriff and the Prosecuting Attorney. Buddy was not under arrest, and was not taken into custody and was left with his parents. He and his parents were questioned but a very short period of time and neither was accused of having committed this crime. During the same evening, the other members of the Willard family were questioned by the officials as well as some of the other neighbors. The investigation was not limited to the Whittington family and no one was taken into custody on that date.

On August 5th, 1966, a complaint was filed by Elwood R. Phillips, Chief of Police of the Village of Baltimore, Ohio, alleging that Buddy Lynn Whittington was a delinquent person in that he did on the 29th day of July, 1966, unlawfully, purposely and maliciously kill one Gladys Willard, and a warrant was issued for his arrest and on the same date, Buddy Lynn Whittington was arrested and taken into custody. This was 7 days after the date that Mrs. Willard was killed.

On the same date, August 5th, 1966, an Entry was filed in said Court showing the defendant to be represented by Attorney Jack Supman and Attorney Judson Kistler. The Journal of the Court also shows that said child was brought before the Court on the same day, August 5th, 1966, and, on motion of counsel for Buddy, the arraignment of him was continued until August 11th, 1966.

On August 10th, 1966, counsel for Buddy Lynn Whittington filed a Motion to have him released to the custody of his parents or for the Court to fix bond for the defendant.

On August 10th, 1966, counsel for Buddy Lynn Whittington filed a Motion to dismiss the complaint on the ground that he was improperly arrested.

On August 10th, 1966, counsel for Buddy Lynn Whittington filed a Motion to dismiss the complaint on the ground that the entire Juvenile Court Act is unconstitutional.

On August 11th, 1966, defendant was arraigned and entered a plea of "not guilty," and said cause was set for hearing on August 24th, 1966.

On August 12th, counsel for defendant filed a motion to suppress any evidence of statements made by the defendant when he was interrogated by law enforcement officers and representatives.

On August 24th, 1966, counsel for defendant filed a motion for the court to fix bond or that the defendant be immediately released to the custody of his parents.

The motion to have Buddy Lynn Whittington released to the custody of his parents, which was filed August 10th, 1966, was heard August 11th, 1966, and, was overruled by the Court in an Entry filed August 25th, 1966. On the same day, August 11th, 1966, the Court heard the motion to dismiss the complaint and the same was overruled by Entry filed August 25th, 1966. On August 11th, 1966, the motion to dismiss based upon the contention that the Juvenile Code was unconstitutional, was heard and overruled by Entry filed August 25th, 1966.

On August 25th, 1966, the Court heard another motion filed by counsel for Buddy Lynn Whittington, for the Court to fix a reasonable amount of bond or release Buddy to his parents and the Court by Entry dated September 1st, 1966, denied said motion.

By Entry dated September 1st, 1966, the Court continued the cause on the ground that essential witnesses were out of the jurisdiction of the Court and could not be present for the August 24th trial date, and continued the cause until September 2nd, 1966.

On September 2nd, 1966, counsel filed another motion to dismiss the proceedings for the reason that the Juvenile

Court provisions of Ohio were unconstitutional. This motion was heard on the same day and overruled by the Court by Entry dated September 7th., 1966.

On September 2nd, 1966, counsel for Buddy Lynn Whittington filed a motion to dismiss the complaint and entire proceedings for seven various reasons, which said motion was heard and overruled on the same day by an Entry dated September 7th, 1966. Also on the same day, September 2nd., 1966, the Court heard the motion of the defendant to suppress evidence of statements made by the defendant and overruled the same in an Entry filed September 7th., 1966.

On September 7th, 1966, counsel for the defendant requested the Court for leave to have the parents take Buddy Lynn Whittington to attend a funeral for the defendant's grand-father, which said application was granted by the Court in an Entry dated September 7th., 1966.

On September 2nd, 1966, this cause came to be heard on its merits and the Court heard all of the evidence offered by the prosecution, no evidence was offered by the defendant except that it was stipulated that the witnesses who previously testified as to the character of the defendant, would be considered as having testified to the same things at this hearing. The Court, in an Entry filed September 7th., 1966 found that Buddy Lynn Whittington was a delinquent child as set forth in the complaint and that he had committed an act which would be a felony if committed by an adult. The Court, pursuant to Section 2151.26 of the Revised Code of the State of Ohio, ordered that William Rutherford, the Juvenile Probation officer, make a full investigation and report the same to the Court and further ordered that Buddy Lynn Whittington be committed to the Juvenile Diagnostic Center of the Ohio Youth Commission for a complete mental and physical examination, the results

of which were to be forwarded to this Court and the Court then continued this cause pending the investigation and the findings of the mental and physical examination of the defendant.

At the hearing on the motion for the Court to release the defendant on bond or to the custody of his parents, Mrs. Whittington, mother of Buddy Lynn Whittington, admitted that she had never been denied the right to see him; that Buddy had a television set there for his convenience; that he had magazines to read and that there had been no necessity to consult the doctor about Buddy because of his physical health or condition.

On September 12, 1966, the defendant filed a Notice of Appeal in the Juvenile Court from the order of the Court made and entered on the 7th day of September, 1966, wherein the Court found the defendant to be a delinquent child as set forth in the complaint.

A Notice of Appeal was filed in the Court of Appeals of Fairfield County, Ohio, on questions of law. The defendant also filed a Motion in the Court of Appeals to release the defendant to the custody of his parents or to fix bond. The Prosecuting Attorney filed a Motion in the Court of Appeals to dismiss the appeal because of the order appealed from was not a final order. Said motions were heard and the Court dismissed the motion of the Prosecuting Attorney to dismiss because the order appealed from was not a final order and, continued the matter of the defendants release upon bond pending the return of the report from the Juvenile Diagnostic Center of Ohio to the Juvenile Court of Fairfield County.

The Court of Appeals of Fairfield County, Ohio, heard and considered this cause and found that there had been no violation of the constitutional rights of the defendant and no error prejudicial to him. They also found that the

Juvenile Code was constitutional. They affirmed the judgment of the Juvenile Court and remanded the same to the Juvenile Court for further proceeding according to law.

On January 16, 1967, defendant-appellant filed a Notice of Appeal on questions of law to the Supreme Court of Ohio from the judgment and final order of the Court of Appeal. The Supreme Court of Ohio dismissed the appeal for the reason that no substantial constitutional question exists herein and overruled defendant-appellants motion directing the Court of Appeals for Fairfield County to certify his record.

On October 9th., 1967, the Supreme Court of the United States granted the petition for writ of certiorari and transfered the case to the appellant docket.

QUESTIONS PRESENTED

1. Was the order of the Juvenile Judge, finding that Buddy Lynn Whittington had committed an act which would have been a felony if committed by an adult and ordering him to the Bureau of Juvenile Research for psychiatric and physical examination, and continuing said cause until said report was received, a final appealable order?

2. Did the statutes of the Juvenile Code of the State of Ohio deny due process of law to Buddy Lynn Whittington in the following respects:

A. Does the fact that the Juvenile Judge received the sworn complaint, issued the warrant for his arrest and heard the case on its merits in the Juvenile Court, constitute a denial of due process to defendant-appellant.

B. Does the fact that the Juvenile Court is empowered to conduct its hearings in an informal manner on a complaint alleging a child to be a delinquent and, without the intervention of a jury, after a full investigation is made,

a psychiatric examination and physical examination is made, recognize a juvenile to the Court of Common Pleas to be treated as an adult, when the complaint alleges a child to be delinquent in that he has committed an act which would be a felony if committed by an adult; or to take other action as provided by law, deny due process to defendant-appellant?

C. Was petitioner denied due process and equal protection when: the juvenile court refused to release him to the custody of his parents or on bond pending his adjudicative hearing?

D. Was petitioner denied due process and equal protection in the proccedings which adjudicated him a delinquent, not a criminal, when the Juvenile Judge by Journal Entry found that the petitioner had committed an act which would have been a felony if committed by an adult; when the state appellate court affirmed the judgment of the Juvenile Court by finding that the judgment of the Juvenile Court was not against the manifest weight of the evidence?

3. Was petitioner denied due process by the admission into evidence of statements made by him to certain witnesses, including law enforcement officials, made by the petitioner in his own home, in the presence of his parents, as a part of the general on the scene investigation?

SUMMARY OF ARGUMENT

I.

This was a proceeding in the Juvenile Court, based upon a complaint in which the petitioner, a child 14 years of age, was alleged to have committed an act which would have been second degree murder if committed by an adult, and that said child was a delinquent child by reason of having committed said act. At a hearing on the merits of the case, the Court found that the petitioner had committed the act alleged in the complaint and, pursuant to Section 2151.26 of the Revised Code of the State of Ohio, the Court ordered a complete investigation of the case and a psychiatric and physical examination of the petitioner and, continued said cause pending the reports of said investigation and examinations.

This was the order appealed from and it is the contention of the respondent that this was not a final order and hence not appealable. This Court, at that time, had not made a final order disposing of the case. It was only after the reports had been received and the investigation completed that the Court would either dispose of the matter in the Juvenile Court or recognize the petitioner to the Common Pleas Court as provided by law. Until this was done, there was no final order.

II.

A. The Juvenile Judge is authorized by statute to receive complaints and to issue warrants for the arrest of juveniles within his jurisdiction if he deems the same to be necessary. The Juvenile Judge is also authorized by statute to hear complaints in an informal manner which would best serve the interest of the child involved.

In the instant case, the complaint was made by the Police Chief, after conferring with the Juvenile Probation

Officer and the County Prosecuting Attorney. The Complaint as drawn was submitted to the Judge of the Juvenile Court and a warrant for the arrest of the petitioner was issued by the Judge and the petitioner brought before the Court on the same date. The record affirmatively shows that no evidence was imparted to the Judge of the Juvenile Court concerning this case except in Court with the petitioner, his parents and counsel present. There is no showing of bias or prejudice on the part of the Juvenile Judge. The Petitioner was not charged with, and could not be convicted of any crime in the Juvenile Court. To say that the petitioner was denied due process of law because his case was heard by the Judge of the Juvenile Court, would be to say that the Juvenile Judge could not hear any complaints as to any child who was delinquent, dependent, crippled or neglected.

This was in the nature of a preliminary hearing and only one stage had been completed, prior to this appeal, in the Juvenile Court. To say that the petitioner did not receive due process of law in the Juvenile Court would be to deny the Juvenile Judge the right to hear and determine any matter.

B. The Constitution of the United States and of the State of Ohio provides for a jury trial for persons charged with crime of any magnitude. A juvenile, under present existing statutes of the State of Ohio, can neither be charged nor found guilty of a crime in the Juvenile Court. A finding of delinquency in the Juvenile Court cannot be used against a juvenile in any other court and cannot affect his civil rights in any manner.

To hold that a child charged with being a juvenile delinquent is entitled to trial by jury in the Juvenile Court would be to hold that a juvenile child is entitled to two jury trials before he could be convicted of a crime. We do

not believe the constitution so provides or was ever intended to be construed in this manner. If a jury trial were afforded to all children charged with being a delinquent child, this would completely nullify any benefits that the child might derive from a Juvenile Court and it would most certainly cause a backlog of cases in the Juvenile Court of this State. The delays made necessary would work to a detriment to the juvenile and the purpose for which the Juvenile Court was created would be destroyed.

C. Whether or not a juvenile child is to be detained pending a hearing in the Juvenile Court, is a matter within the sound discretion of the Court and bond is not a matter of right. Since a juvenile child is not charged with any crime in the Juvenile Court, the constitutional guarantees of bail are not applicable. The statute of Ohio gives the Court the authority to release a child in the custody of a parent, guardian, custodian or of a probation officer or other person appointed by the Court and, also gives the Court the right to detain said child if he finds that said child should be detained pending hearing.

If due process of law required that a juvenile was entitled to bond, it would defeat the entire purpose of the Juvenile Court Act and its duty to protect juveniles.

D. If we accept the fact that the Juvenile Courts were created for the purpose of aiding, assisting and rehabilitating children under the age of eighteen years, we must give the Juvenile Court the authority to deal with these children as we give parents the authority to deal with their children. In other words, the Juvenile Court stands in the relationship of being a parent to all juveniles and interested in what is best for their welfare. It is certain that no parent would be required to find that his child had committed a forbidden act beyond a reasonable doubt before he would be authorized to correct or punish said child.

We are not saying that a Juvenile Judge has never made an error in dealing with children, nor are we saying that parents do not make mistakes in judgment or otherwise in dealing with their children. What we must consider is what is best for the child and how we may best serve said child until he is competent to make his own decisions.

The burden of proof required in criminal cases, "beyond a reasonable doubt," is limited and confined to criminal prosecutions. It has no application in the Juvenile Court. The sole purpose of the Juvenile Court is to rehabilitate the child and not punish him. What useful purpose would it serve to say that a Juvenile Judge would have no control over a juvenile unless he found beyond a reasonable doubt that said child was delinquent, dependent, neglected or crippled. A child is by law required to go to school for a certain number of years or until he has graduated from high school. We do not consider this as being a denial of due process of law to compel him to go to school whether he wishes to or not. If a child is delinquent, neglected, dependent, or crippled, we give the authority, by statute, over said child to the Juvenile Court for the purpose of aiding said child. To say that the Juvenile Judge must find beyond a reasonable doubt that a child is dependent, delinquent, neglected or crippled, before he could take jurisdiction over said child, would defeat the purpose of the statute, which is to aid said child.

3. The statements made by the petitioner to witnesses, including law enforcement officials, were properly admitted into evidence in the instant case. It was shown that these statements were made as a part of the on-the-scene investigation within a matter of a few hours after the body had been found. Said statements were made in the home of the petitioner, in the presence of his parents and while the petitioner was not in custody. In fact the petitioner was

not taken into custody until a week had elapsed after the statements in question had been made.

The statements or admissions in this case certainly do not come within the prohibition of the Miranda Case. To hold that these statements would be inadmissible, would be to deny to peace officers the right to question anybody, no matter how general, at any time after a crime had been committed.

1. THE FINDING OF THE JUVENILE COURT THAT THE PETITIONER HAD COMMITTED AN ACT WHICH WOULD HAVE BEEN A FELONY IF COMMITTED BY AN ADULT IS NOT A FINAL APPEALABLE ORDER.

Before coming to the questions raised by the appellant, there is a threshold question of jurisdiction which must be raised and decided.

The Court of Appeals of Ohio made its determinations upon the basis that the decision of the Juvenile Court was a final order, from which an appeal was properly taken.

In its opinion, the Court of Appeals refers to Sec. 2501.02 Revised Code which provides that the Court of Appeals has jurisdiction:

> "Upon an appeal upon questions of law to review, affirm, modify, reverse or set aside or reverse final orders of courts of record inferior to the Court of Appeals within the district, including the finding, order, or judgment of a juvenile court that a child is delinquent, neglected, or dependent, for prejudicial error committed by such lower court."

The Court of Appeals laid its emphasis upon the words,

> "* * * including the finding, order, or judgment of a juvenile court that a child is delinquent, neglected, or dependent, * * *"

However, the key word of the statute is the word "final." It is only final orders that the Court of Appeals has juris-

diction to review. This elementary rule seems to have been overlooked by the courts below, but it is also elementary that the question of jurisdiction of the subject matter is always open, and may be raised at any stage of the proceedings.

The Constitution of the State of Ohio, Art. IV Section 6 gives to the Court of Appeals

> "* * * such jurisdiction as may be provided by law to review, affirm, modify, set aside, or reverse judgments or final orders of boards, commissions, officers, or tribunals, and of courts of record inferior to the court of appeals within the district."

Pursuant to this constitutional authority, the legislature enacted Chapter 2505 of the Revised Code, which is headed "Procedure on Appeal."

Section 2505.02 Revised Code defines the words "final order." It reads in part as follows:

> "An order affecting a substantial right in an action which in effect determines the action and prevents a judgment, * * * is a final order * * *"

Thus the order of the Juvenile Court on September 2nd, 1966, from which this appeal was taken, must be viewed in the light of these provisions, and also in the light of the provisions of the Juvenile Code.

The statutory definition of a delinquent child, Section 2151.02 Revised Code, includes any child

> "(A) Who violates any law of this state * * *"

The Ohio Juvenile Code, in common with juvenile court laws generally, contains a provision for waiving jurisdiction over a child to the criminal courts under certain circumstances. In that respect, the Ohio statute, Section 2151.26 Revised Code, is very similar to the provision of the District of Columbia Code set forth on PP 547-548 of

Kent v. United States, 383 U.S. 541. The Ohio statute reads in part as follows:

> "In any case involving a delinquent child * * * who has committed an act which could be a felony if committed by an adult, the juvenile judge, after full investigation and after mental and physical examination of such child * * *, may order that such child enter into recognizance with good and sufficient surety, * * * for his appearance before the Court of Common Pleas at the next term thereof, for such disposition as the Court of Common Pleas is authorized to make for a like act committed by an adult; * * *"

This statute is analogous to the provisions of the criminal laws contained in Chapter 2937 of the Revised Code which deal with preliminary examination. Specifically, Sections 2937.10, 2937.11, 2937.12, and 2937.13 Revised Code set up the procedure for preliminary examination and binding over to the grand jury in cases of law violation by adults.

In part, these sections read as follows:

> "2937.10 *Hearing set in Felony Cases.*
>
> "If the charge be a felony, and there be no written plea of guilty or waiver of examination * * *, the court or magistrate, * * * may set the matter for hearing * * *
>
> "2937.11 *Presentation of the State's Case.*
>
> "At the preliminary hearing, * * * the prosecutor * * * shall then proceed to examine witnesses and introduce exhibits for the state * * *
>
> "2937.12 *Motion for Discharge; Presentation on Behalf of Accused; Finding of Court.*
>
> "(A) At the conclusion of the presentation of the state's case accused may move for discharge for failure of proof or may offer evidence on his own behalf. * * *
>
> "(B) Upon the conclusion of all the evidence * * *, the court or magistrate shall either:
>
> "(1) Find that the crime alleged has been committed and that there is probable and reasonable cause to hold or recognize the defendant to appear

before the court of common pleas * * * for trial pursuant to indictment by grand jury;

"(2) Find that there is probable cause to hold or recognize defendant to appear before the court of common pleas for trial pursuant to indictment or information on such other charge, felony or misdemeanor, as the evidence indicates was committed by accused;

* * *

"2937.13 *Basis for Finding; No Appeal; Further Prosecution.*

"In entering a finding, pursuant to Sec. 2937.12 of the Revised Code, the court, while weighing credibility of witnesses, shall not be required to pass on the weight of the evidence, and any finding requiring the accused to stand trial on any charge shall be based solely on the presence of substantial credible evidence thereof. No appeal shall lie from such decision nor shall the discharge of the defendant be a bar to further prosecution by indictment or otherwise."

It is quite apparent from the juvenile court's order of September 2, 1966, that the court was proceeding under Sec. 2151.26 Revised Code toward a possible order recognizing the child to the next term of the Court of Common Pleas for disposition as an adult who had violated a criminal statute, but had not yet reached the point at which such an order could properly be made.

The order contains a finding that the petitioner is a minor under the age of eighteen years, and had committed an act which would be a felony if committed by an adult. The court then orders a full investigation, commitment of the child for a complete mental and physical examination, and continues the case pending the receipt of reports of the investigation and the examination.

Granted, the order contains the language that "* * * the court * * * finds that said Buddy Lynn Whittington * * * is a delinquent child * * *." In view of the language of the

statute, Sec. 2151.26 Revised Code "In any case involving a delinquent child * * * who has committed an act which would be a felony, etc.", the preliminary order would probably be defective without a recital that the child was delinquent. It is clear, however, that since the actual order of the court, as distinguished from the preliminary findings, is merely that an investigation and report be made, and the child committed for a mental and physical examination and report, there was no final order from which an appeal would lie. The order does not determine the action and prevent a judgment. On the contrary, it merely lays the groundwork for a judgment which is yet to come. Depending upon the reports, this judgment may be a recognizance to the next term of the criminal court, or one of the dispositions provided for by the Juvenile Code, sections 2151.01 to 2151.54 Revised Code.

It is very clear from the decision of this Court in *Kent v. United States,* 383 U.S. 541, that as a condition to a valid order recognizing him to the criminal court, "petitioner was entitled to a hearing, including access by his counsel to the social records and probation or similar reports which presumably are considered by the court; and to a statement of reasons for the Juvenile Court's decision." Ibid at P. 557.

The record here shows that the juvenile court was proceeding in the direction of meeting these requirements, but had not reached the point of decision. The most that the order appealed from does is to direct the preparation of the "probation or similar reports" which both court and counsel had the right and duty to consider before reaching a decision "potentially as important to petitioner as the difference between five years confinement and a death sentence."

It in no way determined the action or prevented any judgment which the juvenile court could have made at the time the hearing was commenced.

It is perhaps unfortunate that Sec. 2151.26 Revised Code, which deals with children, does not contain the much more detailed procedural provisions of Sec. 2937.10 to 2937.13 which deal with adults. If it did, the provision of Sec. 2937.13 barring appeal, apparently inserted in the adult statutes out of an abundance of caution, would have required the dismissal of petitioner's appeal to the Court of Appeals. The fact remains, however, that in spite of the difference in detail between the juvenile and adult statutes, the basic situation and the ultimate resolution are both the same. In both, there is a charge that defendant has committed a crime. In both, the final order is a recognizance to the grand jury, which may return a true bill or no bill. In both, a true bill will result in arraignment, plea, and trial by jury, which petitioner claims he was denied.

Since the beginning and end are identical, it follows that the intermediate steps must in effect be the same. The court does not weigh the evidence, and a finding requiring accused to stand trial need be based only on the presence of substantial credible evidence of guilt, no more.

Thus, the respondent contends that when the record in this case is viewed in the light of the statutes of Ohio and the decision of this Court in *Kent v. United States,* 383 U.S. 541, it is clear that none of the questions which the petitioner claims are presented are in fact presented, because there is no final order, either binding him over to the criminal court, or adjudging him to be a delinquent child, and disposing of him as such.

As a further argument that the finding by the Juvenile Court, that the defendant had committed an act which

would have been a felony had it been committed by an adult, is not a final order and therefore cannot be appealed, the following is submitted. Section 2947.25 of the Revised Code of the State in Ohio provides in substance that after conviction and before sentence all persons convicted of certain sex crimes must be referred for psychiatric examination to a department, clinic or psychiatrists for a period of not more than sixty days, to determine if such person is mentally ill, or a mentally deficient offender or a psychopathic offender. The constitutionality of this section has been challenged and, in the case of *The State of Ohio, Appellee v. Thomas, Appellant.* 175 O.S. 563, it was held that the referral of a person by a court of competent jurisdiction, after conviction and before sentence, to an approved state facility for observation for a period of not more than sixty days, is not a final appealable order but a procedural incident, and in accordance with Section 2953.05 Revised Code, any appeal must await and follow the imposition of sentence.

In the instant case, this appeal was taken before the Juvenile Court had an opportunity of making a final order. Hence, the appeal is premature and should be dismissed.

2. THE STATUTES COMPRISING THE JUVENILE CODE OF THE STATE OF OHIO DO NOT DENY DUE PROCESS OF LAW TO JUVENILES

The Juvenile Code of Ohio is contained in Chapter 2151 of the Ohio Revised Code and consist of Sections 2151.01 to 2151.99 of said Revised Code.

"Section 2151.01—Definitions.

(A) As used in the Revised Code, "juvenile judge" or "juvenile court" means the judge or the court exercising the powers and jurisdiction conferred in sections 2151.01 to 2151.54, inclusive, of the Revised Code.

(B) As used in sections 2151.01 to 2151.54, inclusive of the Revised Code:

(1) "Child" includes any child under eighteen years of age, except that wherever reference is made in such sections to a crippled or otherwise physically handicapped child "child" includes any person under twenty-one years of age.

(2) "Adult" includes any person eighteen years of age, or over, who is not a "child" within the meaning of division (B) (1) of this section." [the remainder of this section is not quoted as not being important to this case].

"Section 2151.02—"Delinquent Child" Defined.

As used in sections 2151.01 to 2151.54, inclusive, of the Revised Code, "delinquent child" includes any child:

(A) Who violates any law of this state, the United States, or any ordinance or regulation of a sub-division of the state, except as provided in section 2151.021 of the Revised Code:

(B) Who does not subject himself to the reasonable control of his parents, teachers, guardian, or custodian by reason of being wayward or habitually disobedient;

(C) Who is an habitual truant from home or school;

(D) Who so deports himself as to injure or endanger the morals or health of himself or others;

(E) Who attempts to enter the marriage relation in any state without the consent of his parents, custodian, legal guardian, or other legal authority."

"Section 2151.021 — "Juvenile Traffic Offender" Defined.

A child who violates any traffic law, traffic ordinance, or traffic regulation of this state, the United States, or of any subdivision of this state, shall be designated as a "juvenile traffic offender" and shall not be designated as a delinquent unless it be so ordered by the court after hearing the evidence."

"Section 2151.03—"Neglected Child" Defined.

As used in sections 2151.01 to 2151.54 inclusive, of the Revised Code, "neglected child" includes any child:

(A) Who is abandoned by his parents, guardian, or custodian;

(B) Who lacks proper parental care because of the faults or habits of his parents, guardian, or custodian;

(C) Whose parents, guardian, or custodian neglects or refuses to provide him with proper or necessary subsistence, education, medical or surgical care, or other care necessary for his health, morals, or well being;

(D) Whose parents, guardian, or custodian neglects or refuses to provide the special care made necessary by his mental condition;

(E) Who is found in a disreputable place, visits or patronizes a place prohibited by law, or associates with vagrant, vicious, criminal, notorious, or immoral persons;

(F) Who engages in an occupation prohibited by law, or is in a situation dangerous to life or limb, or injurious to the health or morals of himself or others."

"Section 2151.04—"Dependent Child" Defined.

As used in sections 2151.01 to 2151.54, inclusive, of the Revised Code, "dependent child" includes any child:

(A) Who is homeless or destitute or without proper care or support, through no fault of his parents, guardian or custodian;

(B) Who lacks proper care or support by reason of the mental or physical condition of his parents, guardian, or custodian;

(C) Whose condition or environment is such as to warrant the state, in the interests of the child, in assuming his guardianship."

"Section 2151.05—"Child Without Proper Parental Care"

Under sections 2151.04 to 2151.54, inclusive, of the Revised Code, a child whose home is filthy and unsanitary; whose parents, stepparents, guardian, or custodian permit him to become dependent, neglected, or delinquent; whose parents, stepparents, guardian, or custodian, when able, refuse or neglect to provide him with necessary care, support, medical attention, and educational facilities; or whose parents, stepparents, guardian, or custodian fail to subject such child to necessary discipline is without proper parental care or guardianship."

"Section 2151.23—"Jurisdiction"

(A) The juvenile court has exclusive original jurisdiction under the Revised Code:

(1) Concerning any child who is a juvenile traffic offender or who is delinquent, neglected, dependent, crippled, or otherwise physically handicapped;

(2) To determine the custody of any child not a ward of another court of this state;

(3) To determine the paternity of any child alleged to have been born out of wedlock and to provide for the support of such child, subject to the concurrent jurisdiction of other courts;

• • •

(D) Such court has jurisdiction to hear and determine the case of any child certified to the court by any court of competent jurisdiction, and to make disposition of said child in accordance with sections 2151.01 to 2151.54, inclusive, of the Revised Code."

"Section 2151.25—"Arrest of Child"

When a child is arrested under any charge, complaint, affidavit, or indictment, whether for a felony or a misdemeanor, such child shall be taken directly before the juvenile court. If the child is taken before a judge of a county court, mayor, judge of the police or municipal court, or judge of the court of common pleas other than a juvenile court, such judge of a county court, mayor, judge of the police or municipal court, or judge of the court of common pleas shall transfer the case to the juvenile court. The officers having such child in charge shall take him before the juvenile judge, who shall proceed to hear and dispose of the case in the same manner as if the child had been brought before him in the first instance. Upon such transfer or taking of such child before such judge, all further proceedings under the charge, complaint, information, or indictment shall be discontinued in the court of said judge of a county court, mayor, police or municipal judge, or judge of the court of common pleas other than a juvenile court, and the case relating to such child shall thenceforth be within the exclusive jurisdiction of the juvenile court and shall be deemed to be upon a complaint filed in such court as fully as if the appearance of such child had been upon a complaint filed in and a citation or warrant of arrest originally issued by such court."

"Section 2151.26—"Child Charged with Felony"

In any case involving a delinquent child under sections 2151.01 to 2151.54, inclusive, of the Revised Code, who

has committed an act which could be a felony if committed by an adult; the juvenile judge, after full investigation and after a mental and physical examination of such child has been made by the Bureau of Juvenile Research, or by some other public or private agency, or by a person qualified to make such examination, may order that such child enter into a recognizance with good and sufficient surety, subject to the approval of the judge, for his appearance before the court of common pleas at the next term thereof, for such disposition as the court of common pleas is authorized to make for a like act committed by an adult; or the judge may exercise the other powers conferred in such sections in disposing of such case."

"Section 2151.27—"Complaint Involving Child"

Any person having knowledge of a child under eighteen years of age who appears to be a juvenile traffic offender or to be delinquent, neglected, or dependent, or of a crippled or otherwise physically handicapped child under twenty-one years of age may, with respect to such juvenile traffic offender or such delinquent, neglected, or dependent child, file a sworn complaint, and with respect to such crippled or otherwise physically handicapped child file an application for care in the juvenile court of the county in which such child has a residence or legal settlement, or in which such traffic offense, delinquency, neglect or dependency occurred, or in case of a crippled child, where such child is found. Such application or sworn complaint may be upon information and belief and, except for traffic offenses, shall be sufficiently definite by using the word delinquent, neglected, dependent, crippled, or physically handicapped, as the facts may be."

"Section 2151.28—Citation of Parties; Hearing; Subpoena.

After a complaint or an application for care has been filed under section 2151.27 of the Revised Code, and after such further investigation as the juvenile court directs, unless the parties voluntarily appear, the court shall issue a citation reciting briefly the substance of the complaint or application and requiring the parents, guardian, or the persons who have the custody or control of the child, or with whom such child may be, to appear personally and bring the child

before the court at the time and place stated. If the person cited is other than the parent or guardian of the child, then the parent or guardian, or both, shall also be notified of the pendency of the case and of the time and place of hearing.

Before any temporary commitment is made permanent, the Court shall fix a time and place for hearing and shall cause notice thereof to be served upon the parent or guardian of the child, or published, as provided in section 2151.29 of the Revised Code.

Any person whose presence is considered necessary and who is not cited may be subpoenaed to appear and testify at the hearing. Any one cited or subpoenaed to appear who fails to do so may be punished, as in other cases in the court of common pleas, for contempt of court. Persons subpoenaed shall be paid the same witness fees as are allowed in the court of common pleas.

If it appears that the child is in such conditions or surroundings that his welfare requires that his custody be immediately assumed by the court, the juvenile judge may cause an order to be indorsed upon the citation that the officer serving the same shall take the child into custody at once."

"Section 2151.31—Custody of Child Pending Hearing; Child May be Fingerprinted.

Whenever any officer takes a child into custody, he shall, unless it is impracticable or has been otherwise ordered by the juvenile court, accept the written promise of the parent, guardian or custodian to bring the child to the court at the time fixed. Thereupon such child may be released in the custody of a parent, guardian, or custodian. If not so released, such child shall be placed in the custody of a probation officer or other person designated by the Court, or taken immediately to the court or to the place of detention designated by the court, and the officer taking such child shall immediately notify the court with a written report of the condition or situation which caused the child to be brought in and shall file a complaint when directed to do so by the court.

In the case of any child whose custody has been assumed by the court, pending the final disposition of the case, the child may be released in the custody of a parent, guardian, or custodian, or of a probation officer

or other persons appointed by the court, to be brought before the court at the time designated. When not released, such child, pending the hearing of the case, shall be detained in such place as shall be designated by the court, subject to further order. This section does not forbid any peace officer, police officer, probation officer, or other person authorized by the juvenile judge from taking into custody any child who is found violating any law or ordinance, or who is reasonably believed to be a fugitive from his parents or from justice, or whose surroundings are such as to endanger his health, morals, or welfare."

"Section 2151.34—Place of Detention for Children: District Detention Home.

No child under eighteen years of age shall be placed in or committed to any prison, jail or lockup, nor shall such child be brought into any police station, vehicle, or other place where such child can come in contact or communication with any adult convicted of crime or under arrest and charged with crime; provided that a child fourteen years of age or older may, for good cause shown, and with the consent of the juvenile judge or a person designated by him, be placed in a place of detention for adults, but in a room or ward separate from adults. All children under eighteen years of age, when confined in such places of juvenile detention, shall not be detained for a period to exceed ninety days during which time a social history can be prepared to include court record, family history, personal history, school and attendance records, and as such other pertinent studies and material as will be of assistance to the juvenile court in its disposition of the charges against such juvenile offenders."

* * *

"Section 2151.35.—Informal Hearing: Right of Child to Counsel; Disposition; School District to Bear Cost.

The juvenile court may conduct its hearings in an informal manner, and may adjourn such hearings from time to time. In the hearing of any case the general public may be excluded and only such persons admitted as have a direct interest in the case. The juvenile court shall permit a child to be represented by an attorney at law during any hearing before such court and shall

extend to such child all the rights and privileges of section 2935.14 of the Revised Code. Such attorney at law, the parents or guardian of such child, and any attorney at law representing them shall be entitled to visit such child at any reasonable time and to be present at any hearing involving the child and shall be given reasonable notice of such hearing. Any report or part thereof concerning such child which has been prepared by an employee of the court which is used in the hearing and is pertinent thereto shall for good cause shown be made available to any attorney at law representing the parents or guardian of such child, upon written request prior to any hearing involving such child. All cases involving children shall be heard separately and apart from the trial of cases against adults. The court may excuse the attendance of the child at the hearing in cases involving neglected, dependent, or crippled children. The court shall hear and determine all cases of children without a jury. If the court finds that the child is a juvenile traffic offender or is delinquent, neglected, or dependent, it may by order enter proceed as follows:

(A) Place the child on probation, under supervision in its own home, in the custody of a relative, in an institution, or in a certified foster home, wherever situate, upon such terms as the court shall determine; provided that the court may place delinquent children on a free or wage basis in uncertified foster homes, or may place such delinquent children in foster care facilities approved by the youth commission under the provisions of sections 5139.36 to 5139.40, inclusive, of the Revised Code. The court shall, at the time of placing the child, determine which school district must bear the cost of educating the child while he is residing at such place as the court directs. The decision of the court concerning the expense of the child's education shall be made a part of the order provided by this section;

(B) Commit the child temporarily or permanently to the division of social administration of the department of public welfare, or to a county department of welfare which has assumed the administration of child welfare, county child welfare board, or certified organization, or to the youth commission or to a county or district train-

ing facility created under section 2151.65 of the Revised Code, or to any institution, or to any agency in Ohio or in another state authorized and qualified to provide or secure the care, treatment, or placement required in the particular case;

(C) Impose a fine upon a juvenile traffic offender or a delinquent child not exceeding fifty dollars and costs;

(D) Make such further disposition as the court deems proper;

(E) Commit a male child over sixteen years of age who has committed an act which if committed by an adult would be a felony to the Ohio State Reformatory;

(F) Suspend or revoke the operator's or chauffeur's license issued to any minor found to be a juvenile traffic offender;

(G) Suspend or revoke the registration of all motor vehicles registered in the name of any minor found to be a juvenile traffic offender.

Whenever a child commits an act of delinquency before arriving at the age of eighteen years, and the specific complaint thereon is not filed or hearing held until after said child arrives at the age of eighteen years, the court shall have jurisdiction to hear and dispose of such complaint, as if the complaint were filed and hearing held before such child arrived at the age of eighteen years.

The judgment rendered by the court under this section shall not impose any of the civil disabilities ordinarily imposed by conviction, in that the child is not a criminal by reason of such adjudication, nor shall any child be charged or convicted of a crime in any court, except as provided in section 2151.26 of the Revised Code. The disposition of a child under the judgment rendered or any evidence given in the court shall not be admissible as evidence against the child in any other case or proceeding in any other court, except that the judgment rendered and the disposition of such child may be considered by any court only as to the matter of sentence or to the granting of probation. Such disposition or evidence shall not operate to disqualify a child in any future civil service examination, appointment, or application.

> Whenever a court commits a child to the division of social administration, the department of public welfare, or to any department, board, institution, or agency it shall transmit with the order of commitment an adequate case history of the child and its family. With respect to a crippled or otherwise physically handicapped child, who is neither delinquent, neglected, nor dependent, the court may commit the child temporarily to the division or to any agency in Ohio authorized and qualified to provide or secure the care, treatment, or placement required in the particular case."

The above statutes are quoted for the purpose of showing that they are not in conflict with the guidelines as set forth in the *Kent* case and in the *Gault* case. These statutes, comprising a part of the Juvenile Code of the State of Ohio, show that the Juvenile Judge is really placed in a position of being a father to all juvenile children, whether they are delinquent, neglected, dependent or crippled, either mentally or physically and, that the sole purpose of the Juvenile Court Code is to provide protection and help for the juvenile child on the basis that he or she has not attained sufficient maturity to adequately protect or provide for themselves. A juvenile child may not be found guilty of any crime, or sentenced as a criminal for any offense known to our law. Every statute of the Juvenile Court Act can only be interpreted as separating children from adults with the purpose of assisting or helping said child to become a useful and beneficial citizen, both for himself and society of which he is a part.

A consideration of the Ohio Statutes set forth above will show that a juvenile is entitled to notice of the substance of any complaint against him as provided in Section 2151.28 of the Revised Code of Ohio, and, his parents, guardian or person having custody, care or control of said child is also entitled to notice.

Said child is entitled to a speedy hearing; is entitled

to counsel of his own choosing at every stage of the proceeding; may subpoena witnesses in his behalf; have a record made of the proceedings and, if found to be a delinquent child is entitled to appeal on questions of law to any higher court. The statute further provides that a juvenile may not be confined in any place where he may come into contact or communication with any adult convicted of crime or under arrest and charged with the crime. Section 2151.35 above, further provides that a judgment rendered by the juvenile court against a juvenile shall not impose any of the civil disabilities ordinarily imposed by conviction, in that the child is not a criminal by reason of such adjudication and, that any evidence given in the juvenile court shall not be admissible as evidence against the child in any other case or proceeding in any other court.

In view of the above, how can it be said that a proceeding against a juvenile in the Juvenile Court is a criminal proceeding. The mere fact that a child may be incarcerated by the Juvenile Court, after he has been found to be a delinquent child, does not make it a criminal proceeding. *In Re Darnell,* 175 O.S. 335, Chief Justice Weygandt, in that case quoted from the case of *Prescott vs. State,* 19 O.S. 184 as follows:

> "The provisions referred to in our state constitution relate to the preservation of the right of trial by jury, and to the rights of the accused in criminal prosecutions. We do not regard this case as coming within the operation of either of these provisions. It is neither a criminal prosecution, nor a proceeding according to the course of the common law, in which the right to a trial by jury is guaranteed.
> The proceeding is purely statutory, and the commitment, in cases like the present, is not designed as a punishment for crime, but to place minors of the description, and for the causes specified in the statute, under the guardianship of the public authorities

named, for proper care and discipline, until they are reformed, or arrive at the age of majority."

Judge Weygandt also quoted from the case of *Wissenburg v. Bradley, Judge,* 209 Iowa 813, as follows:

"The statute not being criminal in its nature, nor designed for punishment, and the commitment being for the benefit of the child and for its education and reformation, and to an industrial school or similar institution, the due process of law clause does not, in such a case, require a jury trial."

It is to be noted that a child does not have to commit any crime or violate any law for the court to take custody of said child and confine them to a foster home or a childrens home. The child can also be found to be a delinquent child for a number of reasons other than having engaged in a course of conduct which would be a violation of law if done by an adult. Is there any difference between a statute which requires a child to go to school to learn how to behave and to earn a living as an adult, than a statute which authorizes a Juvenile Judge to commit a child to a foster home, a childrens home or an industrial school after he has found said child to be a delinquent, neglected or dependent child.

There is no authority in the Juvenile Code of the State of Ohio to convict any child of any crime unless and until said child is recognized to the Common Pleas Court. If this is done our code provides that bond must be fixed by the Juvenile Court and he is then entitled to all the rights of an adult and is subject to the same penalties.

2-A. DOES THE FACT THAT THE JUVENILE JUDGE RECEIVED THE SWORN COMPLAINT, ISSUED THE WARRANT FOR HIS ARREST AND HEARD THE CASE ON ITS MERITS IN THE JUVENILE COURT, CONSTITUTE A DENIAL OF DUE PROCESS TO DEFENDANT-APPELLANT?

We refute the fact that there was not an impartial trier of fact in this case based on the transcript of what happened and we refer to page 199 etc., of the record:

"The Court: Well, let's get to that right now. The allegation in the Motion is that the statutes require the Investigating Officer to submit facts to the Judge of this Court as the basis and grounds for issuing a warrant and a Complaint for the arrest of the same, who would be tried by the same Judge. Now, let's get to the point whether or not he did submit facts to the Judge in order to have a warrant issued and a Complaint made. That's the thing I'm interested in knowing right now."

Mr. Kistler: Mr. Rutherford, after you made the investigation as Investigation Officer of this Court, did you advise the Juvenile Judge anything at all in regard to your investigation?

A. Yes sir, I did.

Q. And did you submit to the Judge and advise the Judge of facts which would authorize the issuing of a warrant? A. No sir, I did not. The Judge was not consulted as to whether a warrant should be issued or charges should be brought. Mr. Morehart, the Prosecuting Attorney, is my legal advisor, and I conferred with him and Mr. Phillips in Mr. Morehart's Office, and a decision was made then.

Q. Before the affidavit was filed and before the warrant was issued by this Court, did you advise the Court of your findings? A. I advised the Court as to the situation that had happened, as to the evidence and what had happened. I didn't at that time have a lot of evidence, and the evidence was not confined to the Judge, no sir.

Q. Did you advise the Court of your findings as a result of your investigation? A. I advised him I had been called there and that I was there and the type of situation that arose.

— Q. So that you did advise him as to who was being accused and — A. No one was being accused.

The Court: Wait a minute. You're getting far afield. The point is, Mr. Rutherford, is this a Journal Entry that was signed by me authorizing the issuance of a warrant?

A. Yes sir, it is.

The Court: Now that was signed by me and presented to me for signature, when?

A. It's filed on August 5th.

The Court: Was that pursuant to any of your information or was it pursuant to something else?

A. This was pursuant to a Complaint that was filed by Elwood Phillips in this Court.

The Court: Is this that complaint?

A. Yes sir, it is.

The Court: Is that what you presented to me for the basis of my ordering a warrant?

A. That's right."

* * *

"Q. Now then Mr. Rutherford, before any Complaint was filed in this Court, did you not advise the Court of your investigation and your findings and what you found the evidence to be and your conclusion in regard to the matter? A. No sir, I did not. I informed the Court of the investigation, the kind of investigation, who was involved, but as to the evidence, I did not."

There is no evidence in the record to show that Judge Hastings knew of the evidence in this case prior to any hearings on the matter.

It is of importance here that no charge was made, or can be supported, that the Juvenile Judge in this case relied on any secret information from his staff or otherwise. This is not a case where the record is silent as to ex parte evidence but there is definite affirmative evidence by the probation officer, in the presence of the Juvnile Judge, that no "evidence" was revealed.

In this area, as in many others throughout this case, the defendant-appellant is asking the Court to follow the same strict procedural guidelines for juveniles that seem proper for adults.

If we are to believe there is any iota of merit to the past century of juvenile law, its goals and its accomplishments, then the informal atmosphere and the parental spirit of the Juvenile Code must be preserved. If we remove all the informality, all the discretion, all the strengths of the juvenile system, then this defendant and the thousands who follow in his regimented footsteps have lost.

Judge Don J. Young, Jr., formerly of the Huron County, Ohio Juvenile Court in an address printed in 13 OO 2d 1 says:

> "In the conflict between the opposing forces of critics of the juvenile courts, we must resist to the utmost the efforts of those who would make the law a rigid and dehumanized thing. The greatest feature of our system of law is that it can grow and change with the advances of human knowledge, and adapt itself to social complexities undreamed of when its principles were first formulated. But this power to grow and change only exists when the law is a part of man and men's lives. When the law becomes a thing apart from men and their lives, a force over them but not of them, it also becomes immutable and unchanging so that it can no longer meet the new and greater demands that accompany the growth and progress of society. Those of our profession who work in the juvenile courts and who have looked back into history are particularly aware of the problems inherent in trying to make the law a rigid and inflexible system."
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> • • •
>
> "The whole idea of the modern juvenile court law is that by a flexible and intelligent approach to the individual child and his problems, we may bring the child, no matter how disturbed, to a stable and useful adulthood. Sense, not sentiment; intelligence, not emotion, are the reasonable way to the solution of complex problems. Although there can be no question that our

juvenile courts are a typical development of the common law, which always produces from ancient principles and precedents an effective answer for new or more pressing problems, there are far too many people today who, from lack of real experience or understanding or from mistaking a little learning for wisdom, urge a return to the rigidities of the criminal law in dealing with troubled children; people who so worship the Bill of Rights in the Federal Constitution, or the due process clause of the Fourteenth Amendment, that they want to use them indiscriminately, and to apply them to situations which they were never intended to govern. As one learned judge very recently expressed it, "But the simple, succinct phrases of the Bill of Rights, indestructible protections to some of the fundamentals of our way of life, can be, and often are, expended by rhetorical inflation beyond all semblance to the realities with which they were meant to deal. ***"

* * *

"At this point I would like to get just a little bit technical for a moment, to call attention to one of the great fundamentals of our system of constitutional government, the doctrine of the separation of powers, which is sometimes referred to as our system of checks and balances. Much of the criticism of the juvenile court on so-called "constitutional" grounds shows a lamentable disregard of this important principle. The critics disregard the maxim that the function of the judicial branch of the government is "jus dicere, non jus dare" to interpret the law, not to make it. One writer states that it is too hard to get all of the state legislatures to make a change which he believes desirable in the juvenile court statutes, so he proposes that the change should be accomplished by a broader interpretation of the due process clause of the Fourteenth Amendment. This is an unequivocal proposal of judicial legislation. Repeatedly judges in their decisions are challenging the right of the legislature to define what actions shall constitute crimes, by such expressions as "Precious constitutional rights cannot be diminished or whittled away by the device of changing names of tribunals or modifying the nomenclature of legal proceedings." Our constitutionalists should

get back to taking the Constitution as a whole, and not picking out those clauses which suit their purpose and using them as slogans, or with the idea that the mere mention of the magic words is an irrefutable argument. Then perhaps they could do as we nisi prius judges are required to do, and accept the precedents which hold inequivocally that in this country, the power of parens patriae is vested in the legislature, which has the sovereign right to determine the manner of the its exercise".

2-B. THE FACT THAT A JUVENILE IS NOT ENTITLED TO A JURY TRIAL IN THE JUVENILE COURT WHEN CHARGED WITH BEING A DELINQUENT CHILD, IS NOT A DENIAL OF DUE PROCESS OF LAW.

The defendant-appellant has completely missed the point in his argument concerning a jury trial for Buddy Lynn Whittington.

They argue that this case involves a "serious law violation" whereas in fact it does not involve a "crime". It is no more serious or less serious than any other act committed by any other person charged with being a "delinquent child".

In the March 1967 issue of the American Bar Association Journal, Noah Weinstein, and Corinne R. Goodman, of the Juvenile Court of St. Louis County, Missouri use the following language:

"Some commentators suggest, perhaps with tongue in cheek, that jury trials be used in juvenile court proceedings. No reason is given to support this proposal other than a suggestion vaguely reminiscent of that famous phrase: "What's good for General Motors is good for the nation." It is interesting to note that the American Civil Liberties Union, which prepared appellant's brief in the Gault case, did not present that question for review. Nor do we feel that trial by jury should be extended to juvenile court cases, since the juvenile court is not a criminal court but a court

established, in Missouri by constitution and status, with particular responsibilities in dealing with and protecting children."

* * * * * * * *

"As to the right to a public trial, Missouri specifically provides that "The general public shall be excluded (from a court hearing) and only such persons admitted as have a direct interest in the case or in the work of the Court." We fail to see what benefit the public would receive from hearing details about incest, a child brutally beaten by his parents or a mentally ill child who stabs his playmate. If the basic elements of due process are observed with the protection right to appeal the judge's order, any involvement of the general public is totally unnecessary. But one must distinguish betwen public trials and secrecy. Secrecy must be avoided and the proceedings of the court must always be open to all interested persons, including the press".

This latter comment on the protection of due process and the right of a juvenile to appeal seems most commendatory and is provided for under present Ohio Law.

The Fifth Amendment to the United States Constitution provides that no person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury. The Sixth Amendment to the United States Constitution provides that in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed.

Article I, Section 10, of the Ohio Constitution protects the rights of persons charged with crime in providing that in all felony cases, there must be presentment by a grand jury, a speedy public trial by a jury in the county where the crime was committed, the right to appear in person and with counsel, to demand the nature and cause of the accusation against him and to have a copy thereof, as well as

other guarantees for him to properly prepare and maintain his defense.

In the instant case, since the petitioner was charged with having committed an act which would have been a felony if committed by an adult, he could not be found guilty of committing a crime before an indictment had been returned against him by a grand jury and then been tried and found guilty by a jury.

Under the statutes of the Juvenile Code of Ohio, no child can be convicted of any crime unless and until he has been found to be a delinquent child by the Juvenile Court, and only then when the act committed would have been a felony if committed by an adult, has been recognized to the Common Pleas Court, been indicted by a grand jury and tried before an impartial jury and found guilty, with all of the protection and rights which are afforded to adults who commit the same crime.

In the instant case, the petitioner, Buddy Lynn Whittington, was not charged or found guilty of any criminal offense in the Juvenile Court. He was, after the Court found that he had committed an act which would have been a felony if committed by an adult, after a full investigation had been made, a complete psychiatric and physical examination had been made, recognized to the Court of Common Pleas and bond fixed by the Juvenile Court. From this point on, the petitioner is entitled to all the rights and protection of the law afforded to adults and is subject to all the penalties of the same.

There is no provision in our statutes for a juvenile ever to be found guilty of any crime less than a felony. He cannot be recognized to any other court unless the act he is charged with committing would constitute a felony if he were not a juvenile. To provide that a juvenile is entitled to a jury trial in the juvenile court when he is charged

with being a delinquent child, is to say that a juvenile child cannot be found guilty of a criminal offense until he has had two jury trials by a petit jury and a hearing before a grand jury with an indictment returned against him. We do not believe that due process of law requires two jury trials for a person who has violated a criminal statute which would constitute a felony.

To provide that, in order to constitute due process of law, a child charged with being a delinquent in the Juvenile Court is entitled to a jury trial would take away from the Juvenile Judge the authority which is absolutely necessary if he is to help, aid or benefit the juvenile delinquent. This would be the same as saying to a father or a mother that you cannot discipline your child unless you first had a jury trial to determine if he was a delinquent. We do not claim that a Juvenile Judge is infallible in his decisions concerning juveniles and, it certainly cannot be contended that a jury always bases its decisions and findings on the facts presented.

A father or mother may frequently make mistakes as to who is right or wrong in a parent-child relationship, or among their children, but nothing has yet been found to take the place of a sincere, dedicated parent to combat juvenile delinquency or to insure that their children mature into law abiding citizens.

If a jury of twelve is interposed between the juvenile and the Juvenile Judge, you destroy the whole intention and purpose of the Juvenile Code which was meant to aid, assist, protect and rehabilitate the juvenile delinquent as well as to protect the crippled, neglected or dependent children.

The Brief of Amicus Curiae, The Defender's Office, Cleveland Legal Aid Society in support of Petitioner, recites that for the year 1966, there were 19,394 cases of

all types filed in the Juvenile Court of Cuyahoga County, Ohio. Of this number, 7,296 were delinquency cases, an increase of 12% over 1965. Of the 7,296 delinquency cases only 16 boys were transferred to the Common Pleas Court to face charges as an adult.

How many years would it take to dispose of 7,296 cases if each were entitled to and demanded a trial by jury? How would it be possible for the Juvenile Court to aid, assist or protect juveniles if the Court had to wait two or three years before it could do anything for the juvenile? If the juvenile, charged with being a delinquent child, is entitled to a trial by jury and to bond, all he has to do is to post bond and wait his turn to be tried by jury. In the meantime, he has probably become an adult and there is a great probability that not even the Court can do anything to help him after this length of time with nothing being done. If a juvenile is to be helped and, if juvenile delinquency is to be curbed, the Juvenile Court must have authority to act and act immediately. It must be able to act as a parent should act for the best interest of the child. The parent must not abuse his authority in dealing with his child and, the Court must not abuse the discretion given it by the law. If the Court does abuse its discretion, there is a remedy provided by law for appeal.

2-C. WAS PETITIONER DENIED DUE PROCESS AND EQUAL PROTECTION WHEN: THE JUVENILE COURT REFUSED TO RELEASE HIM TO THE CUSTODY OF HIS PARENTS OR ON BOND PENDING HIS ADJUDICATIVE HEARING?

The question raised by this appeal concerns facts that arose prior to and at the hearing of September 2, 1966. Subsequent proceedings or facts that arose after that time should have no factual bearing on this case.

With this preface, we confine ourselves to facts that arose between August 5, 1966, the date Buddy Lynn Whittington was arrested and confined, until and including the hearing in the Juvenile Court of Fairfield County on September 2, 1966, which hearing and facts preceding such hearing are the basis for this appeal.

At the times in question, Buddy Lynn Whittington was charged with being a delinquent child, in that he had committed a homicide which, under Ohio Law, was classed as second degree murder.

Section *2151.31 of the Revised Code of Ohio* provides as follows:

> "Whenever any officer takes a child into custody, he shall, unless it is impracticable *or has been otherwise ordered by the juvenile court,* accept the written promise of the parent, guardian, or custodian to bring the child to the Court at the time fixed. Thereupon such child may be released in the custody of a parent, guardian, or custodian. If not released, such child shall be placed in the custody of a probation officer or other persons designated by the Court, or taken immediately to the Court *or to the place of detention designated by the Court* and the officer taking such child shall immediately notify the Court with a written report of the condition or situation which caused the child to be brought in and shall file a complaint when directed to do so by the Court." (emphasis added)

Judge Hastings of the Fairfield County Juvenile Court, acting upon this authority, ordered the defendant held in the juvenile quarters of the Fairfield County jail where he remained from the time he was incarcerated until September 2, 1966.

A hearing on the question of bond was held on August 25, 1966, and at the hearing a number of witnesses for the defendant testified as to his good character, and these witnesses expressed their feeling that the defendant was inno-

cent of the charge against him. Upon cross-examination, most of these witnesses for the defendant admitted that if he or she thought the defendant was guilty then their answers could or would be different.

The Judge, in his findings at that hearing, said:

> "The Court: Well, the Court has this to say. This isn't a case of what public opinion, popularity poll, might be about this thing. This Court has a responsibility to this community. This Court has a responsibility to this young man. Motion denied."

In the January 1967 issue of the American Bar Association Journal, Judge Bertran Polow of the Morris County, New Jersey Juvenile and Domestic Relations Court in discussing "The Juvenile Court" uses the following language:

> "The right to bail would also be inconsistent with juvenile court philosophy. The arguments against the bail concept, under intensive attack even in the criminal field, are particularly compelling in the juvenile court. Freedom or confinement of a juvenile should not depend upon the financial status of the child or his parents. Accordingly, in cases where it is found necessary to detain a juvenile prior to final hearing, an expeditious preliminary or detention hearing is essential. Only the judge should have the responsibility to deprive a child of liberty. The almost universal procedure is to release the alleged offender in the custody of his parents if they are reasonably capable of handling him. A child should be confined pending final hearing only when it is necessary for his protection or that of the community."

In *State ex rel Peaks vs. Allaman*, 51 OO 321 The Court held that:

> "A minor detained in a Detention Home as the result of the filing of a delinquency affidavit under Section 1639-23, et seq., G.C., and refused bail under Section 1939-27, GC., because under said section such release is not mandatory, is being lawfully detained since under the provisions of Section 1639-30 GC., he is not charged with an "offense" and therefore not entitled to release on bail under the provisions of Article I, Section 9, of the Ohio Constitution."

We agree that the right to bail would be inconsistent with Juvenile Court philosophy. Freedom or confinement of a juvenile should not depend upon the financial status of the child or his parents, and only the judge should have and does have the responsibility to deprive a child of liberty. A juvenile should be confined pending a final hearing when it is necessary for his protection or that of the community and Judge Hastings so stated in this case. It must be remembered that a juvenile court does function in loco parentis, and it is absolutely necessary that some court or other organization, if not the Juvenile Court, act in this capacity. Is a child entitled to be released on bail from its parent's custody? May a child, by the simple device of posting bond, acquire the right to go where it pleases without let or hindrance? Should parents be able to post a bond and thus return a child to a home that is an unfit place for a child to be? If this be true you then defeat the purpose of the Juvenile Court and prevent the Court from doing what it was intended to do, which is to help juvenile children who are unable to help themselves.

The petitioner has contended that Buddy Lynn Whittington was always held in solitary confinement and that this constituted cruel and inhuman punishment in violation of his constitutional rights. This is a false statement. He was confined in the juvenile quarters of the Fairfield County Jail, separate and apart from the adult prisoners.

Mrs. Whittington, mother of petitioner, testified in a hearing on a motion of the petitioner to release him to his parents or fix bond for him, as follows: (A. 100)

"Cross-examination.

By Mr. Morehart:

Q. Mrs. Whittington, do you go to see Buddy? A. Yes, sir.

Q. How frequently do you go? A. Every day.

Q. Every day. Have you ever been denied the right to see him? A. No sir.

Q. Does Buddy have a television set there? A. Yes sir.

Q. Does he have anything to read? A. Well, he could have if he wanted something to read.

Q. If he wants to read, he could read, I mean; its available? A. Well not there, but we could take it if he wanted it.

Q. And nobody would object to that? A. I don't think so. I never asked, but I don't think so.

Q. But you think he doesn't want anything to read, is that right.

At least, he never asked for anything? A. Well, he reads some. He has some magazines there that he reads.

Q. He does have some magazines that he reads, and he has the television set? A. Yes."

If Buddy Lynn Whittington was alone in the juvenile quarters of the Fairfield County Jail at any time, it was because there were no other juveniles to be confined at that particular time and not because he was to be kept by himself.

The Court of Appeals of Fairfield County, Ohio, found, on actual view, that the petitioner was: "confined in a portion of the jail used for adults and that an adult is in fact now confined in an adjoining cell, in the same room." (A. 253) This was found to be in violation of Section 2151.34 of the Ohio Revised Code. (A. 253) This is further proof that the statutes of the Juvenile Code of the State of Ohio were enacted for the protection of juveniles.

2-D. THE BURDEN OF PROOF REQUIRED FOR THE COURT TO FIND BUDDY LYNN WHITTINGTON TO BE A DELINQUENT CHILD.

There are several Ohio appellate decisions which have held that the degree of proof necessary to find a juvenile guilty of being a delinquent child is "a preponderance of the evidence." *State vs. Shardell,* 8 OO 2nd 262, *In re L————————, Jr.,* 25 OO 2nd 369.

There is no reason, or way to distinguish this case from the Shardell case because in both of these cases the juvenile, while alleged to have committed a serious offense, was only charged with being a "delinquent child." It is not a question of being more or less delinquent, or more serious, or less serious, as the actual charge in the Shardell case and in the instant case were identical.

It is also alleged by the defendant-appellant that the Judge found only that there was "probable cause to believe" the defendant may have done an act which, if done by an adult, would be a felony.

It is well established in Ohio that a judge speaks as the Court only through the Journal of the Court. See *14 Ohio Jur. 2nd., Courts, Section 3,* at page 431.

State ex rel. Ruth v. Hoffman, 37 O.O. 568 provides in part as follows:

> "1. A judge speaks as the Court only through the Court's Journal.
> 2. Neither the oral announcement nor a written memorandum of intention is binding upon the judge, as an act of the Court."

In *Andrews v. Board of Liquor Control,* 164 O.S. 275, the Supreme Court held in part as follows:

> "3. It is an invariable rule that a Court speaks only through its Journal, and where its opinion and its Journal are in conflict the latter controls and the former must be disregarded."

The Entry of the Juvenile Court of Fairfield County, Ohio, on this matter contains the following language:

> "* * * finds that said Buddy Lynn Whittington is a minor under the age of 18 years, 14 years of age, and is a delinquent child as set forth in the complaint, and that said Buddy Lynn Whittington has committed an act which would be a felony if committed by an adult." (A. 54)

For these same reasons, it is clear that if the Court speaks only through its Journal, then the motion of the defendant to dismiss at the conclusion of the State's evidence was properly overruled, as the Court's Entry does show that the defendant was found guilty of the charge of being a delinquent child. No mention of probable cause, proof by a preponderance of the evidence, or beyond a reasonable doubt is mentioned in the Entry.

It is also to be noted from the language of Judge Hastings at page 240 of the Record that he considered that ruling only of a preliminary or intermediate nature. The Judge said in part as follows:

> "And, at this time, it is the order of the Court that the boy be examined, physical and mental examination be made of such child, by the Bureau of Juvenile Research, which, I think, is now called the Diagnostic Center of the Youth Commission. And is Mr. Rutherford here? Would you call him please?
> (Mr. Rutherford summoned by bailiff)
> (Tr. 306) The Court: Mr. Rutherford, in furtherance of the finding of the Court which has just now ordered that a physical and medical examination be made by the Diagnostic Center of the Youth Commission, it is the further order of the Court that—the law requires, after full investigation, the Court ask you to make any further investigation that hasn't already been disclosed in here with regard to this young man and you'll report to the Court.
> Mr. Rutherford: Your Honor do I understand that he is to go to the Diagnostic Center?
> The Court: That's right." (A. 240)

This language of the Court further supports the contention of the State that the order of the Juvenile Court is not a final order and thus is not an appealable order.

In examining the burden of proof question we should first examine the actual complaint that may be filed against a juvenile in the Ohio Juvenile Court.

A juvenile can be said to be a "delinquent child," a "neglected child," a "dependent child" or "a juvenile

traffic offender" and in each case the juvenile judge has authority under Ohio Law to hear the complaint without the intervention of a jury.

Section *2151.35 of the Ohio Revised Code* provides in pertinent part as follows:

> "The juvenile court may conduct its hearings in an informal manner, ***. The juvenile court shall permit a child to be represented by an attorney at law during any hearing before such court ***. All cases involving children shall be heard separately and apart from the trial of cases against adults.*** The Court shall hear and determine all cases of children without a jury.*** If the Court finds that the child is a juvenile traffic offender or is delinquent, neglected or dependent, it may by order entered proceed as follows: [Here follows in a list paragraphs A through G the various actions the Judge may take]."

No mention is made as to the degree of proof necessary for the Juvenile Judge to find a child delinquent, neglected, dependent or a juvenile traffic offender and also no mention is made as to which of these is more or less serious (except for a male over 16 years of age who has committed an act which would be a felony if committed by an adult).

In each of these categories the Juvenile Judge has the authority to take the child from its home; to incarcerate the child; to commit the child to the Ohio Division of Social Administration of Public Welfare; to place the child on probation under various terms under various circumstances; to fine the child (if a juvenile traffic offender or a delinquent child); and to make such further disposition as the court deems proper.

To follow the suggestion of the defendant-appellant would require the court to clearly distinguish between the procedures that must be followed for children charged with being "delinquent," "neglected," "dependent," or "juvenile traffic offenders."

All children who have complaints filed against them in any of the above categories are subject now to the same

procedures, the same possible incarceration and practically the same possible dispositions. It would not be "fair" or "practical" to provide for bond in all of the above type cases or for strict procedural safeguards in each type. The question could be asked to whom would a "neglected" or "dependent" child be released on bond. What amount of bond would a parent who had abandoned his or her child have to provide in order to require the court to return his or her child to parental custody?

In all of these matters, the Ohio Appellate Courts have held the complaints filed in Juvenile Courts against youthful offenders are not criminal in nature, and this basically is because of the loco parentis background of our Juvenile Courts.

To rule that the Fourteenth Amendment to the United States Constitution requires the additional safeguard of the highest degree of proof known to our law before finding a juvenile to be a "delinquent child" would be another step toward treating each juvenile more like an adult, more like a criminal, than has ever been proposed to date.

Many authorities have been filed by the defendant-appellant to show the past and present trends of this court, as well as courts in other jurisdictions of the United States, in support of the contention that the burden of proof required in the Juvenile Court should be higher than by a "mere preponderance of the evidence." The Ohio cases on this point differ from these trends and have held since the matter in Juvenile Court is not criminal in nature that a mere preponderance of the evidence is all that is needed.

This court has held in *Kent vs. U.S.* that the important matter that will be examined by the court is whether or not due process has been met.

It appears from the Kent case, Re Gault case and this case, that we are not as much concerned as to whether petitioner has committed the act wherein he was found to

be a delinquent child by the Juvenile Court, as we are with whether or not all of the strict procedural requirements that make up due process, have been met.

If the Juvenile Courts are restricted and strangled by numerous unnecessary procedural requirements, they will fail in the work that they were established to do; the rehabilitation, discipline, treatment, care and assistance of delinquent, dependent, neglected and crippled children. If the Juvenile Court is prohibited from doing this task, who will be able to assume this responsibility and accomplish this task? Certainly, the adult criminal courts cannot do so, and if they did, the juvenile would be the loser. Someone, preferably the Juvenile Court, with its long past experience, must be able to step in and assist the juvenile when parents fail them.

3. THE STATEMENTS MADE BY PETITIONER AND ADMITTED INTO EVIDENCE BY THE JUVENILE COURT DO NOT CONSTITUTE A DENIAL OF DUE PROCESS OF LAW TO THE PETITIONER

Mr. Phillips, Chief of Police of the Village of Baltimore Ohio, testified that he was recalled to the scene of the Whittington home where the body of Mrs. Willard was found at approximately 8:20 P.M., and that he questioned the members of the Willard family and the Whittington family that evening. The following is a transcript of part of the testimony of Mr. Phillips showing the conversation he had with the petitioner that evening, in the Whittington home. (A. 207 - 209)

"Mr. Phillips: I asked Buddy if he were there all morning, and he said "Yes." And I asked him if he was alone, and he said, "Yes." I asked him if he had seen Mrs. Willard, and Buddy stated yes, she had come to the door about eight o'clock, returned the curlers and left, but he did not know where she went.

Mr. Morehart: By the way, did you see these curlers?

A. Yes, I saw the curlers.

Q. Where were they at the time you saw them? A. They were in the kitchen. * * *

Q. Did you have any further conversation with Buddy Whittington at that time? A. Yes. I asked Buddy if he were there all day, and he said he'd been out part of the day hunting Mrs. Willard; and, in fact, he said all day, about all day he had been hunting Mrs. Willard. And I made the statement that we were not called—she was not officially reported missing until three o'clock. Buddy stated he was out long before that and mentioned 11:30.

Q. You mean, mentioned 11:30? A. Mentioned that he had been hunting her.

Q. Since 11:30? A. Since about 11:30.

Q. All right. A. At the time, I believe, Mrs. Whittington stated she couldn't understand. Buddy had been—had never been left alone more than one hour at a time until that particular day. Of course, she told us that Buddy was supposed to have gone to school that morning, and he didn't go to school, he stated, because he was sick. And he helped hunt then, and he helped me in the afternoon, I'd say approximately four o'clock, when I ran into the boys.

Q. Did you ascertain what time the Whittingtons had left that morning? A. From my understanding, it was approximately 7:30.

Q. Who did you get this from? Where did you learn this? A. I learned it there that day. I'm not going to say any particular person because I don't know. Buddy stated they had left that morning early.

Q. Did he say what he did after they left? A. Why, Buddy stated he went in and lay down on the bed after they left and turned on his record player.

Q. And he told you that he did not go to school because he was ill? A. Because he was ill.

Q. Do you know what time he was supposed to go to school? A. He was to be in class at 8:30.

Q. At 8:30. Did you learn from him what time he would usually, normally leave to go to school? A. No, I didn't ask him what time he would leave to get there.

Q. How far is this from the schoolhouse? A. About two blocks.

Q. It's close? A. It's close, real close.

Q. What if anything further did you do in regard to this investigation? A. I think about that time, you and Mr. Rutherford were there. Of course, I continued my investigation as to trying to find out the details and so forth. But I'm pretty sure that that's about all the questioning, outside of when I came out of the bedroom, Mr. Whittington was standing in the little hallway next to the bedroom. But I've known him for years and years and always called him Bud, and I asked Bud if he knew what might have happened, and Bud stated, "I don't know, unless this boy." Buddy was standing right beside him.

Mr. Supman: "Unless this boy"?

A. That's right. * * *"

Mr. Rutherford, Juvenile Probation Officer, who was called to the Whittington home on the evening of July 29, 1966, the same evening the body was discovered, testified as to his conversation with Buddy Lynn Whittington and his mother and father as follows: (A. 217 - 219).

"Mr. Morehart: All right. After you investigated the bedroom and you had talked to the officials present, what then did you do.

Mr. Rutherford: I talked with Buddy and his parents.

Q. Where did this take place? A. This took place in the dining room, I would call it, of the Whittington home.

Q. Who was present at the time? A. Mr. and Mrs. Orville Whittington and their son, Buddy; Mr. Morehart,

the Prosecuting Attorney; the Chief of Police, Mr. Phillips of Baltimore; Mr. Berry, the Deputy Sheriff; and this other gentleman. I don't recall his name.

Q. Do you recall what the conversation was? A. Yes. The conversation was started out as to where the Whittingtons had been that day, and the conversation was with Mr. Whittington and Mrs. Whittington and the boy. I don't recall whether it was Mr. Whittington or Mrs. Whittington, I believe it was Mr. Whittington, told me that they had gone to Canton to visit some friends or relatives that day and had left in the morning around 7:30 and had returned in the evening around the supper hour, sometime—I don't recall exactly what time they returned home, whether they told me or not. In talking with Buddy, he told me he got up that morning and dressed, and was going to go to school; but that after his parents left, he felt ill and he didn't go to school. And I was informed at that time that he attended a summer class at the Liberty Union School, or the Liberty Union High School, taking a course in mathematics, and he didn't go to school because he felt ill.

Q. Did he tell you the nature of his illness? A. He said he had a stomach-ache.

Q. Any other conversation? A. Yes. I asked him if he'd seen Mrs. Willard that day, and he told me that he had. That sometime about eight o'clock, she come to the door to return some curlers that his mother had loaned her, or used in fixing Mrs. Willard's hair.

Q. Did he say what door she came to? A. Said she came to the rear door, and he said he didn't recall just exactly what she said, but she said something like, "You-Who, anybody home?" Something like that. He just didn't recall exactly what it was, but he got up and went to the door. She handed him the curlers and he laid them there on the chair, I believe, or the table. I believe, it was the chair. And

she turned and walked away. He said he didn't know which way she went, that he went back and lay down on the bed.

Q. Did you have any further conversation with him? A. Yes, I asked Buddy if he had any idea of how Mrs. Willard's body had got under the bed, and he said he didn't know anything about it. I asked him if he had seen anybody else around the neighborhood that day, if there had been anybody come to the door, if there was anybody in the house; he said he hadn't seen anybody. I asked him if he'd left the house in the morning, and he said he'd left some time close to noon. He didn't know exactly what time it was. He thought it was sometime right after eleven o'clock, but he wasn't sure. He said he left after a lady came who was a sister of Mrs. Willard and told him that Mrs. Willard was missing. Then, I think, he said he changed his clothes and went to the berry patch to look for Mrs. Willard.

Q. Did he tell you how long he waited there after the woman came to the door before he left? A. It was some period of time. I don't recall exactly, but it runs in my mind, thirty, forty minutes, something like that. I don't recall. I recall him saying it wasn't right away. He didn't get up and go right away, but he waited and changed clothes and it was a little period of time before he left. But not too awful long. It wasn't immediately. He told me, but I just don't recall exactly. But I think he said thirty, forty minutes, something like that.

Q. That's after the woman had been there inquiring? A. After the lady come and told him. I asked him—he told me he'd gone to look for her, and I asked him how he knew she was missing. And he said this lady had come and told him, asked if she was at the house and asked him if he knew anything about her, that she'd been missing. They couldn't find her. He then said that he went to look for her, and in the afternoon after he'd looked for her, looked

in the berry patch, then he came back and went to baseball practice. * * *."

The questions asked by Mr. Phillips and Mr. Rutherford were all asked as a part of the general on-the-scene questioning with several persons present including the defendant, his father and his mother. The scene was the home of Buddy Lynn Whittington and his parents. The time was within hours of the disappearance of the decedent and the discovery of the body in the Whittington home, in Buddy Lynn Whittington's bedroom.

At the time that Buddy Lynn Whittington was questioned in his home in the presence of his mother and father, Buddy Lynn Whittington was not in custody of the police; he had not been arrested, and the investigation could certainly have been said at that time to be in an initial stage. The investigation at that point had not been narrowed to a point where Buddy Lynn Whittington was a definite suspect but because the defendant was a juvenile, the local authorities had contacted Mr. Rutherford to be there and to take part in the investigation in the eventuality that a juvenile was implicated in any manner. It is good to note at this point that the crime occurred on July 29, 1966, and that while the investigation began that same date, the complaint was not filed and the defendant was not arrested until August 5, 1966.

In *Miranda vs. State of Arizona,* 384 US 436, this Court held that:

> "'Custodial interrogation,' within the rule limiting the admissibility of statements stemming from such interrogation, means questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action if any significant way.
>
> * * * * * * *
>
> Rules relating to warnings and waiver in connection with statements taken in police interrogation do not

govern general on-the-scene questioning as to facts surrounding a crime or other general questioning of citizens in the fact-finding process."

In its opinion in the same case, the Court said at page 444 and 445 that:

"By custodial interrogation, we mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way."

* * * * * * *

"The constitutional issue we decide in each of these cases is the admissibility of statements obtained from a defendant questioned while in custody or otherwise deprived of his freedom of action in any significant way. In each, the defendant was questioned by police officers, detectives, or a prosecuting attorney *in a room in which he was cut off from the outside world.* In none of these cases was the defendant given a full and effective warning of his rights at the outset of the interrogation process. In all the cases, the questioning elicited oral admissions, and in three of them, signed statements as well which were admitted at their trials. They all thus share salient features—*incommunicado interrogation of individuals in a police-dominated atmosphere, resulting in self-incriminating statements without full warnings of constitutional rights.*" (Emphasis added)

At page 477 and 478, the Court also said:

"Our decision is not intended to hamper the traditional function of police officers in investigating crime. See *Escobedo v Illinois,* 378 US 478, 492. When an individual is in custody on probable cause, the police may, of course, seek out evidence in the field to be used at trial against him. Such investigation may include inquiry of persons not under restraint. General on-the-scene questioning as to facts surrounding a crime or other general questioning of citizens in the fact-finding process is not affected by our holding. It is an act of responsible citizenship for individuals to give whatever information they may have to aid in law enforcement. In such situations the compelling atmosphere

inherent in the process of in-custody interrogation is not necessarily present."

The Court cited the following in its footnote to the above:

> "In former times such questioning, if undertaken, would be conducted by police officers visiting the house or place of business of the suspect and there questioning him probably in the presence of a relation or friend. However convenient the modern practice may be, it must normally create a situation very unfavorable to the suspect.' *Chalmers v H.M. Advocate,* (1954) Sess Cas 66, 78 (J.C.)."

The defendant-appellant, in his brief, goes on at length about the many pitfalls that could arise when a juvenile is interrogated or questioned by authorities under various circumstances; but the important issue is what are the facts of this case, not what they might be.

In *Re Gault* the Court said at page 538 that:

> "We consider only the problems presented to us by this case."

We ask the Court to continue that policy and consider only the problems raised by the facts in the instant case.

The facts show that what questioning of the defendant took place did so in his home. The defendant was not in custody, and his father and mother, as well as a neighbor or another relative, were present. The questioning was not prolonged and was not any more than of the: Where were you? What did you see? Did you see anyone else around? When did you last see Mrs. Willard? type of inquiry.

The father was questioned along the same vein, as was the mother of the defendant, and the husband and son of the decedent.

As for the claim of the defendant-appellant that he has repeatedly denied knowledge of the crime, we can only pre-

sume this answer from his not guilty plea. The defendant, Buddy Lynn Whittington, has never testified at any hearings; and only his father and attorneys have denied any knowledge of the incident for him.

The rules set forth in Miranda have not, prior to this time, been applied to juvenile cases. If we are to presume that the original concepts laid down for juvenile courts are correct; and if we are to follow these original precepts and place the court in a fatherly position to the defendant, then naturally the rigid provisions set forth in Miranda should not apply in juvenile proceedings.

The juvenile or minor defendant under eighteen in an Ohio juvenile court is not charged with a crime but is merely a "delinquent child" if found guilty of the charge against him. (Section 2151.35 of the Ohio Revised Code).

We realize that under the language contained in *Re Gault*, this distinction between "criminal" and "delinquent child" is not universally appreciated, but in fact it is an important consideration to the person concerned.

A young man or woman of eighteen or over who was a "delinquent child" and who may have been actually guilty of an act or several acts which would have been felonies, if he or she were over eighteen at the time, can truthfully say on a job application, military service application or college application that he or she has never been convicted of a felony. This distinction is quite valid to the person who might otherwise be refused admission to a college of his or her choice or be denied a job because of a felony record.

Section 2151.35 of the Revised Code of Ohio provides in pertinent part as follows:

> "The judgment rendered by the court under this section shall not impose any of the civil disabilities ordinarily imposed by conviction, in that the child is not a

criminal by reason of such adjudication, nor shall any child be charged or convicted of a crime in any court, except as provided in section 2151.26 of the Revised Code. The disposition of a child under the judgment rendered or any evidence given in the court shall not be admissible as evidence against the child in any other case or proceeding in any other court, except that the judgment rendered and the disposition of such child may be considered by any court only as to the matter of sentence or to the granting of probation. Such disposition or evidence shall not operate to disqualify a child in any future civil service examination, appointment, or application."

While we believe that there is great justification for permitting the juvenile courts to operate outside the strict procedural rules of the Miranda case, we are here basically concerned with the facts and circumstances of the instant case and to extend the application of Miranda to all juveniles would be a great departure from the past, but even then would not affect the outcome of this case.

In this case, there was absolutely no custodial interrogation of Buddy Lynn Whitttington. There was no locking away of the defendant until he confessed. There was no taking him away from his friends or relatives and asking him questions for hours. There was no "Mutt and Jeff" interrogation. There was no bleak jailroom in unfamiliar, strange or frightening surroundings.

To rule that the few questions asked of Buddy Lynn Whittington, and the few responses he made to police authorities, were improperly admitted and should be excluded from testimony in any hearing in juvenile court, would require a rule of law that would prevent any questioning at the scene or anywhere else without giving the full Miranda warning. If you questioned anyone who turned out to be an accused—even at the scene—the answer would thus later be inadmissible if the full warning had not been given.

CONCLUSION

The order appealed from in this case is not a final order, the appeal is premature and should therefore be dismissed.

If this Court decides that the order appealed from is a final order, we submit that children are not adults, are not mature and that their problems require treatment different from that afforded adults. Informality in procedure and flexibility of disposition are essential to the concept of individualized justice. Every child has a different and distinct personality all his own and parents must be able to learn how to treat each child, depending on the distinct personality traits and habits of said child. The Juvenile Court must have the informality in procedure and flexibility of disposition if it is to effectively treat each juvenile as an individual and a blanket application of constitutional guarantees designed to protect adult defendants in criminal cases would vitiate our juvenile court laws, and would not serve the best interests of the juvenile.

For these reasons, it is respectfully submitted that the petitioner was not denied due process of law and the appeal should be dismissed.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1967.

No. 701.

IN THE MATTER OF BUDDY LYNN WHITTINGTON.

ON WRIT OF CERTIORARI
FROM THE COURT OF APPEALS OF OHIO,
FAIRFIELD COUNTY.

BRIEF OF THE NATIONAL COUNCIL OF JUVENILE COURT JUDGES AS AMICUS CURIAE.

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In the Supreme Court of the United States

OCTOBER TERM, 1967.

No. 701.

IN THE MATTER OF BUDDY LYNN WHITTINGTON.

ON WRIT OF CERTIORARI
FROM THE COURT OF APPEALS OF OHIO,
FAIRFIELD COUNTY.

BRIEF OF THE NATIONAL COUNCIL OF JUVENILE COURT JUDGES AS AMICUS CURIAE.

INTEREST OF AMICUS CURIAE.

The National Council of Juvenile Court Judges numbers among its members somewhat in excess of one thousand judges exercising juvenile court jurisdiction. Its members handle nearly ninety percent of the juvenile cases which are filed each year. The National Council is keenly sensitive to the impact of this Court's decisions upon proceedings in the juvenile courts, and the practical problems of administration of justice which arise from those decisions.

The National Council therefore offers this brief as *amicus curiae*. Written consent to the appearance of the Council as *amicus curiae* has been obtained from the attorneys for both parties and is on file with the Clerk.

The National Council of Juvenile Court Judges does not intend by this brief to defend the actions of the courts below.

Much of the difficulties arise under the peculiar provisions of the Ohio statute covering waiver to the criminal

court, § 2151.26 Ohio Rev. Code (Baldwin, 1964). We are informed that there is sharp disagreement among the Judges of Ohio about the requirements of this statute and that an attempt will be made to have it amended at the next session of the Ohio General Assembly.

The shameful confinement of the appellant is contrary to the standards prescribed in the Guides for Juvenile Court Judges promulgated by the National Council many years ago and cannot be condoned. We do not seek by our arguments in this brief to excuse it, but we cannot undo it, however strong our desires to do so may be.

STATEMENT OF THE CASE.

The facts of the case are in considerable dispute. They are stated in detail, in three varying versions, in the briefs of the appellant, in the brief of the appellee and in the opinion of the Court of Appeals of Fairfield County, Ohio. It would serve no useful purpose either to repeat them, or to try to present another version of them, since they are in themselves of no great consequence.

SUMMARY OF ARGUMENT.

1. It is obvious from the record that the Juvenile Court was holding part of a preliminary hearing to determine whether or not to waive jurisdiction to the criminal court, under the Ohio statute governing such proceedings. This statute is inartfully drawn, and by its ambiguity probably caused the unnecessary and erroneous finding of delinquency which appears in the journal entry, but not in the court's findings expressed orally at the conclusion of the hearing. The statute must be construed to make it enforceable and to effectuate its purpose. This requires that the case be remanded to the trial court with instruc-

tions to delete the erroneous finding of delinquency, and to proceed in accordance with the statute and the rule in *Kent v. United States,* rather than considering the errors complained of by appellant, which do not exist when the record is considered in the light of what the proceedings actually were.

2. The constitutional requirement of equal protection of the law does not forbid a proper legislative classification of persons or things subject to the law. The only requirement is that the classification be a reasonable one in relation to the persons or things classified, and the object to be accomplished by the legislation. Legal precedents stretching back to the dawn of time, and a proper recognition of the biological realities of human growth and development establish beyond question that the classification which establishes procedures for the processing and treatment of juveniles separately from adults is reasonable, and hence constitutional.

3. The problem of the quantum of proof required to find a child delinquent on the ground that he committed an act which was a violation of law does not appear to be of constitutional dimensions. Appellant's contention that the finding should be based on proof beyond a reasonable doubt is not supported by any decision of this Court that that degree of proof is constitutionally required even in criminal cases. The general rule in the juvenile court has long been that followed by the appellate court in this case, but if the general rule be wrong, then it is more appropriate to apply the highest degree of proof required in chancery cases, rather than criminal cases. Chancery courts have had jurisdiction over children in trouble for more than three centuries, while the criminal rule of proof beyond a reasonable doubt is based on traditions no more than two centuries old. If an impermissible standard of

proof was followed by the courts below, comity requires that the case be remanded to them for review, rather than this Court weighing the evidence and rendering a final decision.

4. (A) The contention that the statutory provision for pre-trial investigation by the court's probation department automatically biases the judge overlooks the fact that an arm of the court is both legally and practically different from the court itself. A complete interdiction of any pre-trial investigation of delinquency complaints would put children at the mercy of any person motivated by malice, hostility, or mental derangement who chose to file complaints against them. Complaints, however unfounded, could only be determined by trial. Nor is the person who conceives that the court is biased by pre-trial investigation in a particular case without remedy, since he can timely file an affidavit of prejudice and have the judge disqualified.

(B) In addition to the fact that the right to a jury is not constitutionally protected in the state courts by the Sixth and Fourteenth Amendments, and that most state legislatures have not thought it to be consistent with juvenile court philosophy, it does not follow that a juvenile's rights will be any more safeguarded with a jury as fact-finder instead of the judge. Certainly the court as a finder of fact meets the *Gault* test of "essentials of due process and fair treatment," and the introduction of a jury as the finder of fact would greatly diminish the probabilities of successful rehabilitative treatment.

5. There ought to be no issue of bail presented by the record in this case. The Ohio Juvenile Code contemplates that detention of a child is to be the exception rather than the rule, and in essence is very similar to the provi-

sions of the federal Bail Reform Act. Although the Juvenile Court has considerable discretion with respect to detention, there are ample guidelines to determine whether or not that discretion has been properly exercised. Remedies are available where discretion has been improvidently exercised. Bail provisions would be inadequate to protect either the interests of the child or society, because the real question is not whether the child should be in custody, but in whose custody should he be.

ARGUMENT.

Many of the appellant's contentions involve minor and technical points which, although interesting in themselves, are not particularly important to juvenile court operations. The appellant's approach seems to be such that it is difficult to separate the fundamental constitutional problems from the merely technical or procedural ones. We shall, however, attempt to do so, in order that the technicalities may be left to the arguments of counsel for the parties, leaving only questions of major importance to be treated in this argument.

I. THE PROCEEDINGS IN THE TRIAL COURT WERE NOT AN ADJUDICATORY HEARING, BUT PART OF A PRELIMINARY HEARING ON WAIVER TO THE CRIMINAL COURT, AND HENCE DO NOT EXHIBIT THE ERRORS COMPLAINED OF.

The National Council of Juvenile Court Judges contends that a proper understanding of the nature of the proceedings in the Fairfield County Juvenile Court would preclude any determination of the constitutional defects alleged by appellant.

It is obvious from the nature of the alleged offense, the record, and the juvenile court's journal entry that the

case was considered under the provisions of Section 2151.26 Ohio Revised Code, which reads as follows:

> "In any case involving a delinquent child under sections 2151.01 to 2151.54, inclusive, of the Revised Code, who has committed an act which could be a felony if committed by an adult, the juvenile judge, after full investigation and after a mental and physical examination of such child has been made by the youth commission, or by some other public or private agency, or by a person qualified to make such examination, may order that such child enter into a recognizance with good and sufficient surety, subject to the approval of the judge, for his appearance before the court of common pleas at the next term thereof, for such disposition as the court of common pleas is authorized to make for a like act committed by an adult; or the judge may exercise the other powers conferred in such sections in disposing of such case."

The language of this statute is very similar to that of the District of Columbia statute referred to in *Kent v. United States,* 383 U. S. 541 (1966). It is clear from the language of the Juvenile Court Judge (R. 240) that he was conducting a waiver hearing. The Judge said,

> "The court finds that there has been a crime committed here, that there has been a homicide committed on this alleged victim; and the court finds that there is probable cause to believe that this young defendant may have done this act, which, if done by an adult, would be a felony. And, at this time, it is the order of the court that the boy be examined, physical and mental examination be made of such child, by the Bureau of Juvenile Research, called the Diagnostic Center of the Youth Commission."

This language is not a finding of delinquency, although it is a sufficient finding of fact upon which to predicate a waiver of the Juvenile Court's jurisdiction to the

criminal court, if the other elements necessary to waiver exist. We contend that the basic error in this entire proceeding is that the formal journal entry which recites that Buddy Lynn Whittington "is a delinquent child as set forth in the complaint" does not correspond with the Judge's finding as expressed in the record. The finding of delinquency is incompatible with the remainder of the entry, which clearly indicates the court's intention to consider waiving jurisdiction to the criminal court.

Under Section 2151.26 Ohio Revised Code, the juvenile court judge has the alternatives of binding the child over to the grand jury for indictment and trial as an adult criminal, or retaining jurisdiction and disposing of the case as a juvenile court case. The order before this Court does neither, nor does the record show what disposition, if any, has been made of the matter.

Section 2151.26 Ohio Revised Code is inartfully drawn, and its very ambiguity probably occasioned the unnecessary and erroneous finding of delinquency in the journal entry. The statutory words "In any case involving a delinquent child" suggests to many judges that there *must* be a finding that the child is delinquent before the juvenile court can waive jurisdiction to the criminal court. Obviously, the Legislature could not have intended this, for a finding of delinquency determines the child's guilt in the juvenile court, and thus obviates or bars a trial in the criminal court. The manifest intention of the Legislature is thus contrary to the construction requiring a finding of delinquency as a prerequisite to waiver to the criminal court.

The statute, Section 2151.26 Ohio Revised Code, must be construed in such a manner as to make it enforceable and to effectuate the apparent purpose and intent of the Legislature. *United States v. Harriss,* 347 U. S. 612

(1953); *United States v. C. I. O.*, 335 U. S. 106 (1947); *Chippewa Indians v. United States*, 301 U. S. 358 (1937); *State v. Wells*, 146 Ohio St. 131, 64 N. E. 2d 593 (1945); *State ex rel. Attorney General v. Mulhern*, 74 Ohio St. 363, 78 N. E. 507 (1906). The juvenile court judge, proceeding under the statute thus construed, should not make a finding of delinquency, but should only find that there is probable cause to believe that the child had committed the felonious act complained of, and then proceed in compliance with the other provisions of the statute and in conformity with *Kent v. United States*, 383 U. S. 541 (1966).

We submit that this cause ought to be remanded to the Juvenile Court with instructions to strike from the journal entry the finding of delinquency, and to insert in lieu thereof the actual finding of the court that "there is probable cause to believe that Buddy Lynn Whittington has committed the act complained of" and for further proceedings according to law.

Under this disposition of the case, the constitutional questions as to quantum of proof, and jury trial are not presented. Since, however, these questions are of vital importance to the Juvenile Courts throughout the country, we desire to offer to this Court our arguments about them.

II. THE FACT THAT JUVENILE COURT PROCEDURES ARE CONSIDERABLY DIFFERENT FROM ADULT CRIMINAL PROCEDURES DOES NOT RESULT IN A DENIAL OF THE EQUAL PROTECTION OF THE LAW, FORBIDDEN BY THE FOURTEENTH AMENDMENT.

From the first page of the index of appellant's brief, it appears that in three of the four questions presented, appellant contends that he was denied the equal protection of the laws because the Ohio Juvenile Code provides for procedures which are substantially different from the provisions of the state's criminal code.

Both practically and legally, this is an argument so patently unsound that it ought to be sufficient merely to state it to show its unsoundness. Unfortunately, this type of argument and thinking is becoming so common that it perhaps requires some attention.

The decisions are legion that the constitutional requirement of equal protection of the law does not forbid a proper legislative classification of persons or things subject to the law. Many of these decisions deal specifically with the juvenile court statutes in different states. The leading decision, often challenged but still standing after more than sixty years, is *Fisher v. Commonwealth,* 213 Pa. 48, 62 A. 198, 5 Ann. Cas. 92 (1905). There the court says:

> "That minors may be classified for their best interests and the public welfare has never been questioned in the legislation relating to them. Under the act of 1887, the classification of females under 16 years of age means felonious rape, with its severe penalties for what may be done in one day, though on the next it remains simple fornication, to be expiated by a mere fine. * * * The genus homo is a subject within the meaning of the Constitution. Will it be contended that as to this there can be no classification? No laws affecting the personal and property rights of minors as

distinguished from adults? Or of males as distinguished from females? * * *"

This case holds specifically that the legislative classification which establishes different types of procedures for children and adults is constitutionally proper. The case discusses the problem in considerable detail, pointing out numerous other areas of legal classification in which persons of different ages, sexes, or occupations have different rights and duties, or are subject to different penalties or impositions.

The only constitutional requirement in the past has been that the classification be a reasonable one in relation to the persons or things classified, and the objects to be accomplished by the legislation.

In respect to the juvenile court laws, the reasonableness of the classification which separates children from adults ought to be clear upon its face, but in a society such as ours, in which the biological facts are blurred or obscured by poor thinking and improper social customs, perhaps it requires demonstration.

From time immemorial, legal codes have made distinctions between adults and children. The Code of Hammurabi, the earliest surviving body of laws, makes such provision. So does the Code of Justinian. *In re People on Behalf of Syson,* 184 Cal. App. 2d 111, 7 Cal. Rptr. 298 (1960). In England, from which our law derives, the Laws of Athelstane, in the Fourth Century, provided special treatment for children. Rappeport, *Determination of Delinquency in the Juvenile Court: A Suggested Approach,* 1958 Wash. U. L. Q. 123, 128.

Perhaps it would be justifiable to depart from precedents, even from a series of precedents so ancient in origin, if the reasons for them have ceased to exist, but the rea-

son for these precedents is presently as valid as it has ever been. As one author expressed it,

> "Some of the vociferous critics of the juvenile courts seem to forget what the wise parent knows, for example, that children really are not adults. They do not come to life fully equipped with knowledge and wisdom, like Minerva springing full-panoplied from the brow of Jove. They are not like insects which are hatched complete with all the instincts they need to complete their life cycle. On the contrary, human children start life completely helpless and must come to the rights and privileges of adulthood by slow degrees." [1]

It is not difficult to see in this failure to recognize that there is a real difference between children and adults the explanation of much of the difficulty which underlies our present problems of delinquency and youth crime. If a child is to be accorded all the rights and privileges of adulthood, what necessity is there for the child to mature? Adults who are themselves immature, children who have never had to grow up, are unable to lead their own children to maturity, in a vicious circle which is nowhere so apparent as in the juvenile courts.

There is further reason why the classification which makes constitutional the juvenile court laws must logically be permitted to stand. That reason is that if it is

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[1] Young, *The Constitution and the Juvenile Court—Letter or Spirit*, 44 J. Am. Jud. Soc'y 93, 97 (1960).

See also, Kennick, *Where Have We Gone Wrong?* THE BLADE, Toledo, Ohio, September 11, 1966, § G at p. 15, col. 4, which reads in part as follows:

> "Immaturity is the natural condition of childhood. Unfortunately, many modern parents have come to look upon this condition as bad. They cannot bear to see a child as a child. There is a growing social force which dictates that he must be turned into an adult right away * * *"

unconstitutional to provide separate procedures for children who are accused of crime, it is equally unconstitutional to place them under the disabilities of minority for any other purpose, since the same legal and factual basis underlies all classifications. The right to vote, the right to operate a motor vehicle, the right to marry, the right to purchase and use intoxicating beverages, the right to engage in any occupation, are all governed, in every state, and in the United States, by the factor of calendar age. Equally, the obligations of compulsory education and military service are governed by age.

Since this Court itself has recently recognized that it is proper to distinguish between children and adults, by referring to "the commendable principles relating to the processing and treatment of juveniles separately from adults," *In re Gault*, 387 U. S. 1, 19 (1967), and the child's right to be proceeded against in the juvenile court, *Kent v. United States*, 383 U. S. 541, 556, 557 (1966), we ask this Court to overrule the appellant's broad contention in his questions presented that the juvenile court statutes involved which are not identical with criminal statutes deny him the equal protection of the law.

III. JUVENILE COURTS SHOULD NOT BE HELD TO ANY HIGHER STANDARD OF PROOF THAN THAT OF CLEAR AND CONVINCING EVIDENCE IN THE ADJUDICATION OF DELINQUENCY.

Appellant contends that the courts below made a finding of delinquency against him using an impermissible standard of proof. His contention is that the juvenile court found that there was probable cause to believe that he committed the act and that the appellate court affirmed by applying the preponderance of the evidence test. It is argued that the delinquency must be established beyond

a reasonable doubt, or at a minimum, by "clear, unequivocal and convincing" evidence.

This Court's statement in *Kent*, reiterated in *Gault*, that it does not mean to indicate that the hearing held must conform with all of the requirements of a criminal trial or even of the usual administrative hearing, hardly justifies an assumption that the adjudication must be based on the stringent criminal trial requirement of proof beyond a reasonable doubt. We are unaware of any type of administrative hearing in which so heavy a burden is imposed.

The Ohio Juvenile Code, in common with most juvenile codes, makes no specific provision concerning quantum of proof. The general rule in the past has been that an adjudication of delinquency may be based on a preponderance of the evidence. 31 *Am. Jur.* 2d, Juvenile Courts 339 (1967). The courts of Ohio have followed this rule when the question has arisen. *State v. Shardell*, 107 Ohio App. 338, 153 N. E. 2d 510 (1958); *In re Gibson*, 174 N. E. 2d 148, 150 (Ohio Juv. Ct. 1961).

The Supreme Court of Arizona, in the case of *Application of Gault*, 99 Ariz. 181, 407 P. 2d 760 (1965), considered this problem in some detail, and concluded that proof in delinquency cases should be by clear and convincing evidence. In reversing the decision of the Arizona court, this Court did not allude to or pass upon that problem, thus leaving the question open.

It is, of course, arguable that the factual situation here is considerably different from that presented in *Gault*. The Gault boy had been in previous difficulties, and was in fact still on probation at the time of the acts alleged to constitute delinquency, while in the present case, Buddy Lynn Whittington is shown by the record to have been a normal child of a normal family who had never been in

any previous difficulties. He was completely unknown to the court and the law. The police and school authorities had never been troubled or concerned by his activities. The only basis the court could have for adjudicating him delinquent would be that he had committed a single, isolated criminal act. Unhappily, in this case, that act, if appellant committed it, was extremely serious. Thus, the courts below could easily resist the temptation to follow the holding of the Supreme Court of Nebraska that a single act of law violation is not enough to make a child delinquent. *In re Sanders*, 168 Neb. 458, 96 N. W. 2d 218 (1959).

The problem here is whether it is possible to resist the opposite temptation, which is to say that if a single act of law violation is enough to make a child delinquent (and the statute[2] admits of no other construction) then that single act must be established beyond a reasonable doubt. The vast weight of authority is to the contrary. Does reason compel any different conclusion? We submit that it does not.

In the first place, it is very hard to draw a precise line between the various degrees of proof. Proof by a preponderance of the evidence is defined as that quantum of proof that has more convincing force, and produces in the mind of the trier of the fact belief that what is sought to be proved is more likely true than not true. Mathes & Devitt, *Federal Jury Practice and Instructions* 385 (1965). On the other hand, these same authors define proof beyond a reasonable doubt as being such as the trier of the fact would be willing to rely and act upon in the most important of his own affairs (Id. at 83). These are rather subtle differences at best.

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[2] Ohio Rev. Code § 2151.02(A) (Baldwin 1964).

This problem does not appear to be of constitutional dimensions. The appellant cites no case of this Court holding that the defendant in a criminal trial has a constitutional right to a finding of guilty beyond a reasonable doubt. The Ohio rule in criminal cases is a statutory one.[3]

The rule that a defendant must be found guilty beyond a reasonable doubt is said to be a development of the late 18th Century.[4] If the question is to be resolved by reference to rules that are based upon ancient traditions rather than specific constitutional provisions, then, we contend, some attention ought to be paid to the traditions giving separate and special treatment to children in trouble, alluded to previously in this brief, which far antedate the 18th Century.

The Chancery basis of Juvenile Court jurisdiction commenced in 1660 when the Court of Wards and Liveries was abolished. As early as 1722 it was expressly held that the court had jurisdiction over the children. *Eyre v. Shaftsbury*, 2 Peere Williams 103, 24 Eng. Repr. 659 (1722). The appellant insists that conformity to due process requirements should not be evaded by the device of characterizing proceedings as civil rather than criminal, an argument which might be applied with equal force to characterizing matters as legal or equitable. However, in all of the various manifestations of chancery jurisprudence, the highest degree of proof has been that of "clear and convincing" evidence. Can it be said that due process and fair treatment is not attained by accepting the highest degree of proof required by that branch of jurisprudence which since feudal times has been concerned with the protection of the rights of children?

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[3] Ohio Rev. Code § 2945.04 (Baldwin, 1964).

[4] 9 *Wigmore, Evidence* § 2497 (3 ed. 1940).

This Court, in dealing with this matter, should also give some attention to the view of the Children's Bureau of the Department of Health, Education, and Welfare, which endorses the chancery rule of "clear and convincing" proof.[5]

Appellant urges that the evidence against petitioner is constitutionally insufficient to uphold the judgment below, and argues that this Court should make its own evaluation of the evidence. In support of this contention, he cites *New York Times Co. v. Sullivan*, 376 U. S. 254 (1964). It is true that the Court can review the facts to determine if, as a matter of law, the party having the burden, has not met that burden. But in this case it cannot be said that, as a matter of law, the state has not proved its case by "clear and convincing" evidence. Thus, comity requires that this Court, if it finds that the Ohio courts have used an impermissible standard of proof, remand the case to the state courts for them to apply the proper standard.

IV. THE CONTENTION THAT PETITIONER WAS DENIED DUE PROCESS AND EQUAL PROTECTION BECAUSE HE WAS NOT AFFORDED A FAIR TRIAL BY AN IMPARTIAL TRIER OF FACT IS UNFOUNDED.

Appellant, in his brief, argues this contention in two parts, the first concerned with an alleged personal bias of the juvenile court judge, and the second with the denial of a jury trial. We will address ourselves to each of these contentions separately.

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[5] Children's Bureau, HEW, *Standards for Juvenile & Family Courts*, 72 (1966).

A. The Judge's Alleged Participation in the Investigatory and Accusatory Process.

Without going into the factual questions involved in the argument upon this point, we contend that the statutory provisions for pre-trial investigation by the Juvenile Court's probation department serve a useful and necessary purpose, and do not, as appellant seems to assume, automatically and inevitably create a bias on the part of the judge.

We do not agree that there is any real analogy between the rather vague provisions of the Ohio statutes concerning pre-hearing investigation and the contempt proceedings before a judge who was acting as a one-man grand jury, with which this Court was concerned in *In re Murchison*, 349 U. S. 133 (1955).

There is both a real and a legal distinction between actions taken by an arm of the court, such as a probation officer, and the court itself. To ignore this distinction, as appellant seeks to do in his argument, is to call into question all those cases in which the judge of a court which issues a search warrant or a warrant for arrest afterwards presides at the trial of the person searched or arrested. This procedure is common even in the District Courts of the United States.

It is true that the statutory provision for investigation by the probation department prior to trial[6] raises philosophical questions which are difficult. That the courts and bar of Ohio are aware of them is illustrated by the following comment:

> "To what extent the power of investigation is or should be used in the intake process is difficult to determine. It is almost impossible to find anything in

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[6] Ohio Rev. Code § 2151.14 (Baldwin, 1964).

> either case or text law bearing on the subject. Lawyers instinctively rebel at the idea of court investigations before hearing, seeing in them an improper combining of the functions of judge and prosecutor. The trend seems to be away from any use of the court's investigative powers until the jurisdictional facts have been established although the *Standard Juvenile Court Act*, Art. III § 12(1) [7] positively requires preliminary investigation in most cases. The Children's Bureau, in its publication *Standards for Juvenile and Family Courts* (Publication No. 437-1966) at pages 13 and 54 takes the traditional legal position against preliminary investigations designed to establish jurisdictional facts." [8]

Before accepting the appellant's contention that any investigation before trial is constitutionally impermissible, it is well to consider the other alternative, that the juvenile court must proceed to trial of every complaint alleging a child to be delinquent. If such is to be the law, then every complaint, however groundless, filed by a person motivated by malice, hostility, or mental aberration, must result in the child being brought before the court for a hearing. It is obviously impossible to tell from the face of the complaint whether or not it is baseless. Any holding that no employee of a juvenile court may make any preliminary examination without automatically biasing the court will in the end do harm out of all proportion to any benefits it may have.

This is particularly true because the party accused is not without remedy if there is any real reason to suppose that the court has actually been biased by any preliminary investigation. He can always file an affidavit of prejudice

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[7] 5 N. P. P. A. Journal 327, 351 (1959).

[8] Ohio Legal Center Institute, Reference Manual for Continuing Legal Education, Family Law 7, 14 (1967).

and seek a determination of the facts. However, it is too well established to require the citation of authority that one who claims the court is prejudiced must seek to disqualify the judge prior to trial. He cannot wait to determine the outcome of the hearing, and then, if it be not to his liking, seek to avoid it on the ground of prejudice.

We ask that this Court uphold the statutes of Ohio, and the provisions of the *Standard Juvenile Court Act*, and require that one who claims that any preliminary investigation by the court's probation department has prejudiced the court seek relief from such prejudice before, rather than after, hearing.

B. The Fact That the Juvenile Court Laws Do Not Grant the Right of Trial by Jury to Children Charged With Delinquency Should Not Be Held to Make These Laws Unconstitutional.

There is no justification for the contention, either in law or reason, that a juvenile is entitled to a jury trial on the question of his delinquency. The Sixth and Fourteenth Amendments to the United States Constitution do not give alleged youthful offenders in the state courts such a right, nor do the decisions of our courts. In the case of *Palko v. Connecticut*, 302 U. S. 319, 324-5 (1937), Justice Cardozo stated:

> "The Sixth Amendment calls for a jury trial in criminal cases and the Seventh for a jury trial in civil cases at common law where the value in controversy shall exceed twenty dollars. This court has ruled that consistently with those amendments trial by jury may be modified by a state or abolished altogether. *Walker v. Sauvinet*, 92 U. S. 90; *Maxwell v. Dow*, 176 U. S. 581; *New York Central Ry. Co. v. White*, 243 U. S. 188, 208; *Wagner Electric Mfg. Co. v. Lyndon*, 262 U. S. 226, 232.

> "The right to trial by jury and the immunity from prosecution except as the result of an indictment may have value and importance. Even so, they are not of the very essence of a scheme or ordered liberty. To abolish them is not to violate a 'principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.' *Snyder v. Massachusetts,* 291 U. S. 97; *Brown v. Mississippi,* 297 U. S. 278; *Hebert v. Louisiana,* 272 U. S. 312."

It does not appear that this Court has held, subsequent to *Palko, supra,* that the right to trial by jury under the Federal Constitution is imposed upon the states by the Fourteenth Amendment. And more specifically, federal and state courts have consistently held that juveniles have no right to a jury in juvenile proceedings. In 1911 a federal court, in examining the Ohio juvenile act, determined that the act was not unconstitutional because it failed to provide for a jury trial. *Ex Parte Januszewski,* 196 Fed. 123 (C.C. S.D. Ohio 1911). And a later federal case, construing the Fourteenth Amendment due process clause, held that jury trial in state courts is not a federally protected right. *United States v. Cavell,* 294 F. 2d 12, 19 (3d Cir. 1961), cert. denied, 370 U. S. 945 (1962).

In so holding, the Circuit Court had a sound basis of legal precedent extending bac' over a century. As early as 1839 it was argued that statutes which authorized commitment and detention of an infant without jury trial were unconstitutional. This argument was rejected, the Supreme Court of Pennsylvania holding that:

> "as to the abridgment of indefeasible rights by confinement of the person, * * * we know of no natural right to exemption from restraints which conduce to an infant's welfare." *Ex Parte Crouse* 4 Whart. 9 (Pa. Sup. Ct. 1839).

More recently, the Ohio Supreme Court held that lack of a jury trial did not render the proceeding in a juvenile court violative of Sections 5 and 10 of Article I of the Ohio Constitution.[9] *In re Darnell,* 173 Ohio St. 335, 182 N. E. 2d 321 (1962). And the Superior Court of Pennsylvania, when confronted with a juvenile appellant's claim to a jury right, held that this right was not among the elements of due process which the United States Supreme Court has said must be afforded youthful offenders. *Commonwealth v. Johnson,* ____ Pa. Super. ____, 234 A. 2d 9 (1967).

Although *Kent v. United States,* 383 U. S. 541 (1965) and *In re Gault,* 387 U. S. 1 (1967), have introduced into the juvenile court some of the traditional trial court procedures and safeguards which adult defendants enjoy, it would be a fallacious interpretation of these cases to contend that this Court now requires juveniles to be treated exactly as adults. While the *Gault* decision did not address itself specifically to the question of right to jury trial for juveniles, there is language in the majority opinion to the effect that the Court did not intend to bring in all Sixth Amendment rights by implication along with those due process elements expressly enumerated. The Court quotes from its earlier opinion in *Kent, supra,* where it was said:

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[9] 5. Trial by jury.

"The right of trial by jury shall be inviolate, except that, in civil cases, laws may be passed to authorize the rendering of a verdict by the concurrence of not less than three-fourths of the jury."

10. Trial for crimes; witness.

"In any trial, in any court, the party accused shall be allowed * * * a speedy public trial by an impartial jury of the county in which the offense is alleged to have been committed; * * *"

> "'We do not mean * * * to indicate that the hearing to be held must conform with all of the requirements of a criminal trial or even the usual administrative hearing; but we do hold that the hearing must measure up to the essentials of due process and fair treatment.' 383 U. S. at 562.
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> "We reiterate this view, here in connection with a juvenile court adjudication of 'delinquency,' as a requirement which is part of the Due Process Clause of the Fourteenth Amendment of our Constitution." 387 U. S. at 30.

The Court in *Gault* thus appears to be attempting a balance between the better aspects of juvenile and adult criminal procedure, and not obliterating all distinctions between the two.

Despite the fact that no federal decisions have held jury trials mandatory in juvenile proceedings, clearly the states have the right to utilize a jury as the finder of fact. However, most states have not seen fit to do so. In the Task Force Report on Juvenile Delinquency and Youth Crime, prepared as an augmentation to the 1967 general report of The President's Commission on Law Enforcement and Administration of Justice, it is stated at page 38:

> "Most States do not provide jury trial for juveniles. Even Illinois, New York, and California, which have recently revised their juvenile court laws to increase procedural safeguards for the child, have not extended the right to trial by jury. There is much to support the implicit judgment by these states that trial by jury is not crucial to a system of juvenile justice. As this report has suggested, the standard should be what elements of procedural protection are essential for achieving justice for the child without unduly impairing the juvenile court's distinctive values.
>
> "As has been observed, 'A jury trial would inevitably bring a good deal more formality to the juvenile

court without giving the youngster a demonstrably better fact-finding process than trial before a judge.'" [quoting from Paulsen, *Fairness to the Juvenile Offender*, 41 Minn. L. Rev. 547, 559 (1957)].

When the unique functions of a juvenile judge are considered, it is apparent that the addition of a jury to the proceedings would substantially impair the court's effectiveness as a rehabilitative influence upon the children before it, as well as not affording a better fact-finding process. For the judge in a juvenile court is much more than a trier of fact. He has the delicate task of communicating and relating to the child, establishing rapport with him, so that the child will be receptive to the court's efforts in deterring an anti-social adult life, and will have his behavior patterns permanently altered. To inject twelve other adults into this precarious situation, lay people who are not even peers of the accused as they are in criminal trials of other adults, is unnecessarily to make more difficult a procedure which already presents complex problems.

V. THE EIGHTH AMENDMENT PROVISION FOR BAIL IN CRIMINAL ACTIONS DOES NOT EXTEND TO CHILDREN BROUGHT BEFORE THE JUVENILE COURT, AND SHOULD NOT BE EXTENDED TO SUCH MATTERS.

At the outset, it ought to be remembered that the Eighth Amendment provision with respect to bail is couched in rather negative terms, providing only that "Excessive bail shall not be required." It is at least arguable that this is not necessarily equivalent to a provision that persons are required in all circumstances to be admitted to bail.[10]

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[10] The Eighth Amendment is subject to various interpretations as to the extent to which it, unaided by statute, creates a

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Furthermore, the present matter, upon its facts, did it not involve a child, would be a capital offense, and at least from the basis of the statement of facts in the appellee's brief upon the motion for certiorari, the presumption is great. There ought, therefore, to be no issue of bail presented by the record in this case under the Constitution of the United States, or the law of Ohio.[11]

However, since one of the popular complaints about juvenile court procedures is the alleged absence of provisions for bail, there ought to be some consideration given to the matter. Actually, for reasons which will be set forth below, the question of the right of a juvenile to bail has been rarely raised. It is stated that there are only five reported cases dealing with this problem.[12] Two cases hold a child has a constitutional right to bail: *State v. Franklin,* 202 La. 439, 12 So. 2d 211 (1943); *Trimble v. Stone,* 187 F. Supp. 483 (D. D. C. 1960), only the latter of which was decided under the United States Constitution. Two cases hold a child does not have a constitutional right to bail: *State ex rel. Peaks v. Allaman,* 115 N. E. 2d 849 (Ohio App. 1952); *Ex parte Cromwell,* 232 Md. 305, 192 A. 2d 775 (1963). The fifth case is ambiguous, but holds the restraint of the child was "an improvident

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constitutional right to bail. See Foote, *The Coming Constitutional Crises in Bail,* 113 U. Pa. L. Rev. 959, 1125 (1965). The National Council of Juvenile Court Judges takes no position in this regard. Likewise we express no opinion as to whether the Eighth Amendment bail provision applies to state criminal proceedings through the Fourteenth Amendment. Our sole argument is that the Eighth Amendment should not require bail in all cases in juvenile courts as a matter of right.

[11] Article I, Section 9 of the Constitution of the State of Ohio provides in part as follows: "All persons shall be bailable by sufficient sureties, except for capital offences [sic] where the proof is evident, or the presumption great. * * *"

[12] National Council of Juvenile Court Judges, 561-2 Judge's Directory & Manual (1963).

exercise of the discretion vested in the court." *Application of Jacobsen*, 278 App. Div. 945, 104 N. Y. S. 2d 949 (1951).

The Ohio statutes with reference to the detention of juveniles pending hearing are fairly typical of juvenile court statutes generally. Section 2151.31 Ohio Revised Code provides in part as follows:

> "Whenever any officer takes a child into custody, he shall, unless it is impracticable or has been otherwise ordered by the juvenile court, accept the written promise of the parent, guardian, or custodian to bring the child to the court at the time fixed. Thereupon such child may be released in the custody of a parent, guardian, or custodian. If not so released, such child shall be placed in the custody of a probation officer or other person designated by the court, or taken immediately to the court or to the place of detention designated by the court, and the officer taking such child shall immediately notify the court with a written report of the condition or situation which caused the child to be brought in and shall file a complaint when directed to do so by the court.
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> "In the case of any child whose custody has been assumed by the court, pending the final disposition of the case, the child may be released in the custody of a parent, guardian, or custodian, or of a probation officer or other person appointed by the court, to be brought before the court at the time designated. When not released, such child, pending the hearing of the case, shall be detained in such place as shall be designated by the court, subject to further order.
>
> "This section does not forbid any peace officer, police officer, probation officer, or other person authorized by the juvenile judge from taking into custody any child who is found violating any law or ordinance, or who is reasonably believed to be a fugitive from his parents or from justice, or whose surroundings are such as to endanger his health, morals, or welfare. * * *"

It is quite clear that these statutes contemplate that detention shall be the exception, rather than the rule, and that the promise of those responsible for the care of the child, rather than bail, shall be relied upon to guarantee the child's appearance.

The Standard Juvenile Court Act, Article IV §§ 16, 17 and 18[13] makes somewhat more detailed provisions than those in the Ohio statute. The subject of detention of children is considered at length in the *Guides for Juvenile Court Judges*, published by the National Council on Crime and Delinquency. Chapter VII, pp. 42-48, sets up six classes of children who should be held in custody, and three classes of children who should be released. Thus, the courts are not without standards which can prevent arbitrary action.

It is true that under these provisions considerable discretion is granted to the Juvenile Court as to whether or not a child ought to be held in custody, but as *Application of Jacobsen, supra,* points out, there is a remedy for an abuse of this discretion. The National Council agrees with this Court's statement in *Kent* that the Juvenile Court Acts do not "confer upon the Juvenile Court a license for arbitrary procedure."[14] However, this is not a reason for taking away altogether the Juvenile Court's discretion in matters of detention. Practically, the Juvenile Court under these statutes possesses much the same discretion that is granted to the federal courts under the Bail Reform Act of 1966.[15] This Act resulted from the recognition of the harsh reality that the constitutional prohibition of excessive bail did not serve to prevent grave injustices.

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[13] 5 N. P. P. A. Journal, 327, 357 (1959).

[14] 383 U. S. 541, 553.

[15] 18 U. S. C. §§ 3141 et seq.

In summary, conceding the fact that appellant was treated unfairly in this case, this Court should not hold that there is a right to bail in juvenile court cases. There is no reason why a juvenile court in children's cases should have to go beyond what is required in adult criminal cases, and strong reason, apart from statutes, why the right to bail should not apply. The Ohio statutes and the *Guides for Juvenile Court Judges* provide more than adequate guidelines as to when a child should be released to the custody of his parents. Furthermore, Ohio Revised Code Section 2151.34 set forth the conditions under which a child may be detained. This statute even provides for detention in foster homes in lieu of a detention facility. Furthermore, the condition of the county jail, if detention there is required, is set forth by the statute.

The answer is not the strict criminal procedure of bail, which obviously makes no sense in juvenile court proceedings. Is a child entitled to be released on bail from the parent's custody? May a child, by the simple device of posting a bond, acquire the right to go where he pleases without let or hindrance?

A number of years ago, a learned writer on problems of Juvenile Court procedure expressed his views on bail as follows:

> "Obviously, bail ought not to be a *matter of right* in a juvenile case, not because the proceedings are civil rather than criminal in character but, more importantly, because a child in trouble may need care immediately, and that care is not provided by a simple release from custody. Discharge to parents will not be wise in every case because the parents may be the source of the child's difficulty. Of course some review of the decision to keep the child in detention ought to be available in the courts. The writ of habeas

corpus can accomplish the release of a boy or girl arbitrarily kept in custody before adjudication." [16]

Bail provisions are not adequate in juvenile court proceedings. The question regarding children is not whether they shall be in custody but in whose custody should they be placed. Of course, the parents should always be the first choice. But sometimes discharge to the parents would not be in the best interests of the child or the public. In these cases reasonable alternatives should be sought. The Ohio statute permits the court to designate another person than the parent. Furthermore, it can hold the child in a detention home for children, if the county has such a facility, or in a foster home. Requiring bail in juvenile cases would not be sufficient to safeguard the interests of the children involved nor of society.

VI. CONCLUSION.

As stated at the outset of this brief, The National Council of Juvenile Court Judges does not seek to defend the actions of counsel for the parties, or of the courts below, or to excuse the treatment accorded to the appellant. The record sets one's teeth on edge. Our only concern is that the constitutional issues presented should be resolved, not upon a narrow basis of attempting solely to correct or atone for the wrongs done during the course of this litigation, but in such a manner that clear guidelines will be established for the avoidance of future injustice to children in trouble, and to the public. To this end only the arguments presented herein are respectfully submitted.

MERRITT W. GREEN, ESQ.,
Counsel for Amicus Curiae.

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[16] Paulsen, *Fairness to the Juvenile Offender*, 41 Minn. L. Rev. 547, 552 (1957).

APPENDIX A.

CONSTITUTION AND STATUTES.

Article I, § 5 of the Ohio Constitution provides:

5. Trial by jury.

"The right of trial by jury shall be inviolate, except that, in civil cases, laws may be passed to authorize the rendering of a verdict by the concurrence of not less than three-fourths of the jury.

Article I, § 9 of the Ohio Constitution provides:

9. Bailable offenses; of bail, fine and punishment.

"All persons shall be bailable by sufficient sureties, except for capital offenses where the proof is evident or the presumption great. Excessive bail shall not be required; nor excessive fines imposed; nor cruel and unusual punishments inflicted

Article I, § 10 of the Ohio Constitution provides in pertinent part:

10. Trial for crimes; witness.

"In any trial, in court, the party accused shall be allowed * * * a speedy public trial by an impartial jury of the county in which the offense is alleged to have been committed; * * *."

The Bail Reform Act of 1966 provides in pertinent part:

18 U. S. C. A. § 3146. Release in noncapital cases prior to trial.

(a) Any person charged with an offense, other than an offense punishable by death, shall, at his appearance before a judicial officer, be ordered released pending trial

on his personal recognizance or upon the execution of an unsecured appearance bond in an amount specified by the judicial officer, unless the officer determines, in the exercise of his discretion, that such a release will not reasonably assure the appearance of the person as required. When such a determination is made, the judicial officer shall, either in lieu of or in addition to the above methods of release, impose the first of the following conditions of release which will reasonably assure the appearance of the person for trial or, if no single condition gives that assurance, any combination of the following conditions:

(1) place the person in the custody of a designated person or organization agreeing to supervise him;

(2) place restrictions on the travel, association, or place of abode of the person during the period of release;

(3) require the execution of an appearance bond in a specified amount and the deposit in the registry of the court, in cash or other security as directed, of a sum not to exceed 10 per centum of the amount of the bond, such deposit to be returned upon the performance of the conditions of release;

(4) require the execution of a bail bond with sufficient solvent sureties, or the deposit of cash in lieu thereof; or

(5) impose any other condition deemed reasonably necessary to assure appearance as required, including a condition requiring that the person return to custody after specified hours.

(b) In determining which conditions of release will reasonably assure appearance, the judicial officer shall, on the basis of available information, take into account the nature and circumstances of the offense charged, the weight of the evidence against the accused, the accused's family ties, employment, financial resources, character

and mental condition, the length of his residence in the community, his record of convictions, and his record of appearance at court proceedings or of flight to avoid prosecution or failure to appear at court proceedings.

18 U. S. C. A. § 3148. Release in capital cases or after conviction.

A person (1) who is charged with an offense punishable by death, or (2) who has been convicted of an offense and is either awaiting sentence or has filed an appeal or a petition for a writ of certiorari, shall be treated in accordance with the provisions of section 3146 unless the court or judge has reason to believe that no one or more conditions of release will reasonably assure that the person will not flee or pose a danger to any other person or to the community. If such a risk of flight or danger is believed to exist, or if it appears that an appeal is frivolous or taken for delay, the person may be ordered detained. The provisions of section 3147 shall not apply to persons described in this section: *Provided,* That other rights to judicial review of conditions of release or orders of detention shall not be affected.

The Ohio Juvenile Court statutes provide in pertinent part (Ohio Revised Code):

Section 2151.02 "Delinquent child" defined.

As used in sections 2151.01 to 2151.54, inclusive, of the Revised Code, "delinquent child" includes any child:

(A) Who violates any law of this state, the United States, or any ordinance or regulation of a subdivision of the state, except as provided in section 2151.021 of the Revised Code;

(B) Who does not subject himself to the reasonable control of his parents, teachers, guardian, or

custodian, by reason of being wayward or habitually disobedient;

(C) Who is an habitual truant from home or school;

(D) Who so deports himself as to injure or endanger the morals or health of himself or others;

(E) Who attempts to enter the marriage relation in any state without the consent of his parents, custodian, legal guardian, or other legal authority.

Section 2151.14 Duties and powers of probation department; records; command assistance.

The chief probation officer, under the direction of the juvenile judge, shall have charge of the work of the probation department. The department shall make such investigations as the juvenile court directs, keep a written record of such investigation, and submit the same to the judge or deal with them as he directs. The department shall furnish to any person placed on probation a statement of the conditions of probation and shall instruct him regarding them. The department shall keep informed concerning the conduct and condition of each person under its supervision and shall report thereon to the judge as he directs. Each probation officer shall use all suitable methods to aid persons on probation and to bring about improvement in their conduct and condition. The department shall keep full records of its work, keep accurate and complete accounts of money collected from persons under its supervision, give receipts therefor, and make reports thereon as the judge directs.

The reports and records of the department shall be considered confidential information and shall not be made public. A probation officer may serve the process of the court within or without the county, and may make arrests without warrant upon reasonable information or upon

view of the violation of sections 2151.01 to 2151.54, inclusive, of the Revised Code, detain the person arrested pending the issuance of a warrant, and perform such other duties, incident to his office, as the judge directs. All sheriffs, deputy sheriffs, constables, marshals, chiefs of police, and other police officers shall render assistance to probation officers in the performance of their duties when requested to do so by any probation officer.

Section 2151.26. Child charged with felony.

In any case involving a delinquent child under sections 2151.01 to 2151.54, inclusive, of the Revised Code, who has committed an act which could be a felony if committed by an adult, the juvenile judge, after full investigation and after a mental and physical examination of such child has been made by the youth commission, or by some other public or private agency, or by a person qualified to make such examination, may order that such child enter into a recognizance with good and sufficient surety, subject to the approval of the judge, for his appearance before the court of common pleas at the next term thereof, for such disposition as the court of common pleas is authorized to make for a like act committed by an adult; or the judge may exercise the other powers conferred in such sections in disposing of such case.

Section 2151.31 Custody of child pending hearing; child may be fingerprinted.

Whenever any officer takes a child into custody, he shall, unless it is impracticable or has been otherwise ordered by the juvenile court, accept the written promise of the parent, guardian, or custodian to bring the child to the court at the time fixed. Thereupon such child may be released in the custody of a parent, guardian, or cus-

todian. If not so released, such child shall be placed in the custody of a probation officer or other person designated by the court, or taken immediately to the court or to the place of detention designated by the court, and the officer taking such child shall immediately notify the court with a written report of the condition or situation which caused the child to be brought in and shall file a complaint when directed to do so by the court.

In the case of any child whose custody has been assumed by the court, pending the final disposition of the case, the child may be released in the custody of a parent, guardian, or custodian, or of a probation officer or other person appointed by the court, to be brought before the court at the time designated. When not released, such child, pending the hearing of the case, shall be detained in such place as shall be designated by the court, subject to further order.

This section does not forbid any peace officer, police officer, probation officer, or other person authorized by the juvenile judge from taking into custody any child who is found violating any law or ordinance, or who is reasonably believed to be a fugitive from his parents or from justice, or whose surroundings are such as to endanger his health, morals, or welfare. No child shall be fingerprinted or permitted to be fingerprinted or photographed by any officer or other person holding him in custody without the consent of the judge. When the judge permits the fingerprinting of any child, the prints shall be taken on a civilian and not on a criminal card and shall be kept only in the civilian file. Provided that any child recognized to the court of common pleas, under section 2151.26 of the Revised Code, shall not be exempt from fingerprinting and photographing. In every such case the officer taking such child into custody shall immediately report

the fact to the court and the case shall then proceed as provided in sections 2151.01 to 2151.54, inclusive, of the Revised Code.

The Ohio statute providing for detention of children provides:

Ohio Rev. Code Section 2151.34 Place of detention for children; district detention homes.

No child under eighteen years of age shall be placed in or committed to any prison, jail, or lockup, nor shall such child be brought into any police station, vehicle, or other place where such child can come in contact or communication with any adult convicted of crime or under arrest and charged with crime; provided that a child fourteen years of age or older may, for good cause shown, and with the consent of the juvenile judge or a person designated by him, be placed in a place of detention for adults, but in a room or ward separate from adults. All children under eighteen years of age, when confined in such places of juvenile detention, shall not be detained for a period to exceed ninety days during which time a social history can be prepared to include court record, family history, personal history, school and attendance records, and such other pertinent studies and material as will be of assistance to the juvenile court in its disposition of the charges against such juvenile offenders.

Upon the advice and recommendation of the judge, the board of county commissioners shall provide, by purchase, lease, construction, or otherwise, a place to be known as a detention home, which shall be within a convenient distance of the juvenile court, and not used for the confinement of adult persons charged with criminal offenses, where delinquent, dependent, neglected children,

or juvenile traffic offenders may be detained until final disposition. Upon the joint advice and recommendation of the juvenile judges of two or more adjoining or neighboring counties, the boards of county commissioners of such counties shall form themselves into a joint board, and proceed to organize a district for the establishment and support of a detention home for the use of the juvenile courts of such counties, where delinquent, dependent, neglected children, or juvenile traffic offenders may be detained until final disposition, by using a site or buildings already established in one such county, or by providing for the purchase of a site and the erection of the necessary buildings thereon. Such county or district detention home shall be maintained as provided in sections 2151.01 to 2151.54, inclusive, of the Revised Code. In any county in which there is no detention home, or which is not served by such a district detention home, the board of county commissioners shall provide funds for the boarding of such children temporarily in private homes. Children who are alleged to be or adjudged delinquent, dependent, neglected, or juvenile traffic offenders, may, after complaint is filed, be detained in such detention home or certified foster homes until final disposition of their case. The court may arrange for the boarding of such children in certified foster homes or in uncertified foster homes for a period not exceeding sixty days, subject to the supervision of the court, or may arrange with any county department of welfare which has assumed the administration of child welfare, county child welfare board, or certified organization to receive for temporary care children within the jurisdiction of the court.

In case a detention home is established as an agency of the court, or a district detention home is established by the courts of several counties as hereinbefore provided,

it shall be furnished and carried on, as far as possible, as a family home in charge of a superintendent or matron in a non-punitive neutral atmosphere. The judge, or the directing board of a district detention home, may appoint a superintendent, a matron, and other necessary employees for such home and fix their salaries. During the school year, when possible, a comparable educational program with competent and trained staff shall be provided for those children of school age. A sufficient number of trained recreational personnel shall be included among the staff to assure wholesome and a profitable leisure-time activities. Medical and mental health services shall be made available to insure the courts all possible treatment facilities shall be given to those children placed under their care. In the case of a county detention home, such salaries shall be paid in the same manner as is provided by section 2151.13 of the Revised Code for other employees of the court, and the necessary expenses incurred in maintaining such detention home shall be paid by the county. In the case of a district detention home, such salaries and the necessary expenses incurred in maintaining such detention home shall be paid as provided in sections 2151.341 to 2151.3415, inclusive, of the Revised Code.

In case the court arranges for the board of children temporarily detained in such foster homes, or arranges for such board through any private certified organization, a reasonable sum to be fixed by the court for the board of such children shall be paid by the county. In order to have such foster homes available for service an agreed monthly subsidy may be paid and a fixed rate per day for care of children actually residing therein.

The Ohio statute providing for proof beyond a reasonable doubt in criminal cases provides:

Ohio Rev. Code Section 2945.04 Reasonable doubt.

A defendant in a criminal action is presumed to be innocent until he is proved guilty of the crime charged, and in case of a reasonable doubt whether his guilt is satisfactorily shown, he shall be acquitted. This presumption of innocence places upon the state the burden of proving him guilty beyond reasonable doubt.

Reasonable doubt is defined as follows: "'It is not a mere possible doubt, because everything relating to human affairs or depending upon moral evidence is open to some possible or imaginary doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction to a moral certainty of the truth of the charge."

In charging a jury the trial court shall state the meaning of presumption of innocence, and read said definition of reasonable doubt.

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In the Supreme Court of the United States

OCTOBER TERM, 1967.

No. 701.

IN THE MATTER OF BUDDY LYNN WHITTINGTON

BRIEF OF AMICUS CURIAE, THE DEFENDER'S OFFICE, CLEVELAND LEGAL AID SOCIETY IN SUPPORT OF PETITIONER.

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March 21, 1968.

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—TEL. (216) 621-5647

In the Supreme Court of the United States

OCTOBER TERM, 1967.

No. 701.

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BRIEF OF AMICUS CURIAE, THE DEFENDER'S OFFICE, CLEVELAND LEGAL AID SOCIETY IN SUPPORT OF PETITIONER.

The Defender's Office of the Cleveland Legal Aid Society, with the consent of counsel for the Petitioner and Respondent herein, files this brief as Amicus Curiae in support of the position of Petitioners to reverse the judgment of the Court of Appeals, Fifth Appellate District, Fairfield County, Ohio, 13 Ohio App. 2d 11. Information contained in this brief purports to indicate that the practices complained of in the Brief for the Petitioner are not confined to small rural counties, but, in fact, these injustices are multiplied and magnified in Cuyahoga County, the largest county in the State of Ohio.

I. Interest and Position of Amicus.

The Defender's Office is the criminal branch of the Cleveland Legal Aid Society. Since the opening of the office on March 1, 1960, its lawyers, in their capacity as defense attorneys for the indigent, have voluntarily represented hundreds of juveniles charged with delinquency. Its interest in Juvenile Court is to help guarantee to the juvenile who is charged with an offense that would be a felony if he were an adult his full share of justice and the protection of his constitutional rights.

The work of the Defender's Office in Juvenile Court has been voluntary, and no payment from the Court has been received at any time.

The Defender's Office supports the position of Petitioner that a juvenile charged with a crime that would be an adult felony is entitled to proof beyond a reasonable doubt that he committed the offense, to an impartial trier of fact, to a jury trial if he wishes, to the protection of the *Miranda* guarantees, to bail granted under reasonable and proper standards and conditions, and, if he must be incarcerated, to be incarcerated under just and humane conditions.

This brief will not cite or repeat the arguments and authorities contained in Petitioner's brief other than to express support and agreement therewith.

II. Data on Cuyahoga County Juvenile Court.*

In 1966, a total of 19,394 cases of all types were filed in the Juvenile Court. This figure was a 4.4% increase over 1965. Of these cases, 7,296 were delinquency cases, an increase of 12% over 1965.

The charges most frequently brought against boys were:

Type of Complaint	Number of filings in 1966
unlawful entry and stealing	723
other thefts	710
injury to person	591
incorrigibility	573
auto theft	563
auto trespassing and tampering	527
destruction of property	347

* Data as reported herein, unless otherwise specifically noted, is from the Juvenile Court of Cuyahoga County, Cleveland, Ohio, Annual Report (1966).

As can easily be noted, all the above, except perhaps for some situations under the vague "incorrigibility" section, are potential felony charges for the juvenile, depending upon his age and the disposition of the Juvenile Court Judge to bind him over to the criminal court.

The charges most frequently brought against girls were:

Type of Complaint	Number of filings in 1966
incorrigibility	550
sex offenses	255
other stealing	203
injury to person	113

Of the 7,296 delinquency cases filed in 1966, only 665 were dismissed and 142 were marked "other disposition." In other words, 6,631 delinquency cases were processed to some kind of conclusion other than a dismissal.

Of those found to be delinquent in the Cuyahoga County Juvenile Court in 1966, 766 were committed or returned to a "public institution." These institutions were:

Institution	Number Committed
Ohio State Reformatory (a penal institution for adult felons under age 30 with no prior felony convictions)	40
Ohio Youth Commission	576
Cuyahoga County	150

An additional 16 boys were transferred to Common Pleas Court to face charges as an adult.

The preliminary draft of the 1967 Annual Report of the Juvenile Court of Cuyahoga County, Cleveland, Ohio, indicates that 53 juveniles were committed to the Ohio State Reformatory in 1967. This is 13 more than were committed there in 1966.

Another 2,646 adjudged delinquents were placed or continued under the supervision of Juvenile Court probation officers. According to the 1966 Annual Report statistics, 72% of all probation contacts occurred within the Court buildings. Forty-eight percent of these in-the-court-building contacts were by telephone. Only 28% of probation contacts occurred in the field.

A total of 4,212 juvenile delinquents were under care in the Detention Home during 1966. The average daily population of the Detention Home during the year was 171.

Although there is no mention in the Annual Report, some juveniles are also detained in the Cuyahoga County Jail while awaiting disposition of their cases in the Juvenile Court. A check of the Cuyahoga County Jail on February 19, 1968, showed that 12 juveniles were incarcerated there among a total jail population of about 560 inmates. Although the majority of the juveniles are on the Eighth Floor, the rest are scattered throughout the jail. The criterion for placement of a juvenile on a particular floor in the County Jail is the availability of room. Juveniles are placed on the Eighth Floor whenever possible, but when that floor is crowded, they are put on whatever floor can accommodate them. The other inmates on the Eighth Floor, like the rest of the jail, are federal and state prisoners awaiting trial or sentencing, or being held as probation or parole violators.

CONCLUSION.

The foregoing statistics emphasize the importance of ensuring that just and constitutional procedures are followed in the Juvenile Courts of Ohio. The volume of delinquency cases in this County, the number of commitments to penal-type institutions, especially to the Ohio State Reformatory, the detention in Cuyahoga County jail along with adult felons, the number of delinquents bound over for trial as adults, and the other practices pointed out in the foregoing statistics emphasize the arguments made in Petitioner's Brief that the judgment of the Court of Appeals, Fairfield County, Ohio, should be reversed.

Respectfully submitted,

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IN THE

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October Term, 1967

No. 701

In the Matter of

BUDDY LYNN WHITTINGTON

On Writ of Certiorari to the Court of Appeals of Ohio, Fairfield County

BRIEF OF THE LEGAL AID SOCIETY OF NEW YORK, AS *AMICUS CURIAE*

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BRIEF OF THE LEGAL AID SOCIETY OF NEW YORK, AS *AMICUS CURIAE*

Interest of the *Amicus*

The Legal Aid Society of New York is a non-profit charitable corporation chartered by the State of New York to furnish legal assistance to persons unable to retain counsel.

Pursuant to New York's Family Court Act of 1962, the Society's attorneys are assigned as "law guardians" to represent all otherwise unrepresented juvenile respondents in delinquency proceedings in the Family Court of the City of New York.

The attorneys for the parties have consented to the filing of this brief.

Introduction

Although the arguments advanced herein are directed only to the burden of proof aspect of the case now before this Court, our position with respect to that issue reflects our considered and unreserved commitment to the proposition that in the adjudicatory phase of a delinquency proceeding a child charged with criminal conduct is entitled to all procedural and substantive safeguards generally applicable to the criminal truth finding process together with such additional rules as may be uniquely applicable to the juvenile process. In addition, the accused is entitled to those constitutional protections generally associated with criminal proceedings which, although not essential to the truth finding process, reflect an overriding social policy.

In passing we note that although much has been said and written about the rights of the child, and of the state as *parens patriae,* little consideration has been given to the rights of interested and devoted natural parents. Their rights to the custody and companionship of their children also ride upon vicissitudes of the burden of proof. See, *Armstrong* v. *Manzo,* 380 U. S. 545 (1965).

POINT I

The reasonable doubt standard is applicable to the adjudicative phase of a delinquency proceeding by virtue of the due process and equal protection clauses of the Fourteenth Amendment.

Although the phrase "beyond a reasonable doubt" is of relatively recent origin, it is the modern articulation of the oldest and most profound concept in common law jurisprudence. The phrase is the law's sophisticated refinement of society's determination that only the guilty shall be subjected to the loss of liberty. Sometimes expressed in terms that it is better to free a number of guilty persons rather than convict ~~one~~ innocent,* the essence of the concept relates to the quality of proof or degree of certainty necessary to overcome ". . . the overriding presumption of innocence with which the law endows the accused." *Morisette* v. *United States,* 342 U. S. 246, at 275 (1952).**

This need for certainty prior to the imposition of penal sanctions† can be traced back as far in history as one cares to go.

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* II Hale, *Pleas of the Crown* 290; IX Holdsworth, History of the English Law 224 (1925).

** The presumption of innocence is regarded by some writers as a corollary of proof beyond a reasonable doubt. See, Wigmore, *Evidence,* §2511 (3d ed.); III Greenleaf, *Evidence,* §29 (8th ed., 1868). Since the presumption of innocence is not an evidentiary presumption, its value is dependent solely upon and fluctuates with the degree of proof necessary to overcome it. *See,* Ohio Rev. Code Ann. §2945.04 which ties reasonable doubt with the presumption of innocence.

† A penal sanction need not be punitive in order to be penal. Rehabilitation commitments are just as much part of the penal process as are punitive sentences. *Specht* v. *Patterson,* 386 U. S. 605 (1967); *United States* v. *Brown,* 381 U. S. 437, 458 (1965).

Clause 36 of the Magna Charta states the right to a trial under the highest standard of proof known to medieval man. By ordeal or by battle, an accused could call upon the infallible judgment of God acting thorough His chosen instrumentalities and "Providence was deemed to have determined in favor of truth . . ." IV Blackstone Commentaries *348.

While we know of no reasonable doubt charge given to the early English jurys, the role of the oath served to impose a Divine standard upon both jurors and witnesses.* Jurors would take an oath to perform their duties faithfully and believed God would punish them if they did not.

When witnesses testified, their oath would insure the truthfulness of their testimony. IX Holdsworth, History of the English Law, 225, 231 (1925).**

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* A perhaps somewhat more effective reasonable doubt standard was that enforced by King Alfred, who in one year is reported to have hanged 44 judges for having rendered "incorrect" verdicts in capital cases. III Greenleaf, *Evidence,* §29, p. 29 (8th ed., 1868). While we do not know what standard of proof these unfortunate jurists applied, one can safely assume that their successors applied one calling for a considerable higher degree of certainty. Greenleaf also traces the higher criminal standards back to its Biblical and Greco-Roman origins.

** A typical sixteenth century jury direction illustrates this:

> "Good men . . . have an eye to your oath and to your dutie and do that which God shall put in your mindes to the discharge of your consciences, and marke well what is said"

Sir Thomas Smith, *De Republica Angelorum,* Bk II, ch. 23, quoted in Holdsworth, *supra,* at 226.

Greenleaf points out that the common law oath of jurors in criminal cases was in markedly different form than that taken in civil cases and finds in the oath of the criminal juror to "true deliverance make" a standard of certainty not required by the oath of a civil juror. III Greenleaf, *Evidence supra,* §29.

And it was need for certainty in criminal verdicts which was used as the basis for refusing counsel to the accused in criminal trials—

> ". . . because the evidence to convict a prisoner should be so manifest as it could not be contradicted."

III Coke, *Institutes,* 29, 137 (1797)

This standard is so ingrained in the common law that it is universally accepted as a fundamental part of our legal process.

Had the Petitioner been charged with a crime and tried in the criminal courts of Ohio, he would have been tried under a standard of proof requiring that his commission of the criminal act be established beyond a reasonable doubt. By classifying Petitioner as "juvenile" rather than "adult" the State seeks to withdraw the procedural rights generally available to persons charged with the commission of criminal acts and in so doing has effectively removed the presumption of innocence from juvenile offenders. While the classification of offenders as juvenile and adult can be assumed to be a reasonable classification for some purposes, it does not follow that the classification has legal significance when invoked in a manner having no relevance to the purpose for which the classification was made. *Baxstrom* v. *Herold,* 383 U. S. 107 (1966); *Walters* v. *City of St. Louis,* 347 U. S. 231 (1954).

The juvenile-adult distinction is totally without legal significance when sought to be applied to the standards of proof in the adjudicatory phase of a delinquency proceeding. We can conceive of no argument—nor has one ever

been urged—which in any way justifies a factual determination of criminal juvenile conduct under a standard of proof less than reasonable doubt.

The reasonable doubt standard is one which not only has stood the test of time but is one which has been accepted as the only test in both federal and state prosecutions. Its rejection in juvenile proceedings rests upon the irrelevant and inaccurate notion that incarceration of a juvenile for purposes of rehabilitation does not require the care or certainty that is required for the incarceration of an adult. Even assuming the basic premise that incarceration for rehabilitation is a benevolence, this case proves the wisdom of Justice Brandeis' observation that,

> "Experience should teach us to be most on our guard to protect liberty when the government's purposes are beneficient" *

Conclusion

For the foregoing reasons the judgment of the Court of Appeals of Ohio should be reversed and the case remanded with directions to vacate the judgment of the Juvenile Court of Fairfield County.

Respectfully submitted,

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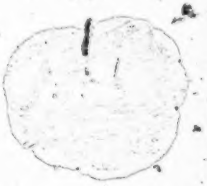
* *Olmstead* v. *United States*, 277 U. S. 438, at 479 (1928) (dissenting opinion).



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—of—

BUDDY LYNN WHITTINGTON

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF OHIO, FAIRFIELD COUNTY

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. 701

In the Matter

—of—

BUDDY LYNN WHITTINGTON

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF OHIO, FAIRFIELD COUNTY

REPLY BRIEF FOR THE PETITIONER

The best characterization of the facts in this case has been given by the National Council of Juvenile Court Judges (hereinafter "National Council") in its Brief Amicus Curiae:

> "The record sets one's teeth on edge." Brief of the National Council, p. 28.

As the National Council also states:

> "The shameful confinement of the appellant is contrary to the standards prescribed in the Guides for Juvenile Court Judges promulgated by the National Council many years ago and cannot be condoned. We do not

> seek by our arguments in this brief to excuse it, but we cannot undo it, however strong our desires to do so may be." *Id.*, p. 2.

Unlike the National Council—and respondent—we believe that this Court can and should undo this "shameful confinement" and reverse the judgment of delinquency against petitioner. In this Reply Brief, we will address ourselves primarily to the procedural objections interposed by respondent and the National Council, which are illusory. On the merits of the constitutional issues we wish merely to correct certain apparent misconceptions of respondent and the National Council and to bring to this Court's attention several important new cases in support of our position, decided since our original Brief was written.

I.

The Delinquency Adjudication of the Juvenile Court Is a Final Judgment Reviewable by This Court.

Respondent claims that there is no final appealable order in this case. Brief for the Respondent, pp. 16-22. It is clear, however, that the judgment of the Juvenile Court adjudicating petitioner a delinquent child and committing him to the custody of the Ohio Youth Commission (A. 54) has the requisite finality for review by this Court under 28 U.S.C. § 1257.

"The most pertinent source of inquiry as to finality, outside of the judgment and opinion, is the law of the state wherein the judgment was rendered." Stern & Gressman, *Supreme Court Practice*, § 3-9, p. 75 (3rd edit. 1962).

The relevant Ohio statute makes the judgment against petitioner appealable. Ohio Rev. Code Ann. § 2501.02 provides that the Ohio Court of Appeals shall have jurisdiction:

> "Upon an appeal upon questions of law to review, affirm, modify, set aside or reverse judgments or final orders of courts of record inferior to the Court of Appeals within the district, *including the finding, order or judgment of a juvenile court that a child is delinquent,* neglected or dependent for prejudicial error committed by such lower court;" (emphasis supplied).

The District Court of Appeals of Ohio held in this case that the judgment against petitioner is a final appealable order under this statute. It specifically overruled respondent's motion to dismiss the appeal for lack of a final order (A. 249-251). Respondent raised the same objection in opposing petitioner's appeal in the Supreme Court of Ohio. Memorandum of Plaintiff-Appellee Contra Motion in Support of Jurisdiction, pp. 20-21. In dismissing the appeal, however, the Supreme Court of Ohio did so for lack of a substantial constitutional question, not for any jurisdictional reason or lack of finality in the judgment[1] (A. 274).

This judgment also has the necessary incidents of finality under the prior decisions of this Court construing its own jurisdictional statutes. This Court "has adopted essentially practical tests for identifying those judgments which are, and those which are not, to be considered 'final.'" *Brown Shoe Co.* v. *United States,* 370 U.S. 294, 306 (1962). It has

[1] This Court granted certiorari despite respondent's reiteration of the claim that the judgment lacked finality. Respondent's Brief in Opposition to Petition for Certiorari, pp. 20-21.

looked to the precise impact of the judgment on individuals and their rights.

The impact of the judgment adjudicating petitioner delinquent was immediate and enormous. It labeled him with the stigma of having committed murder, since this charge was the sole basis for the delinquency adjudication. It operated on him coercively, since it ordered him committed to the custody of the Ohio Youth Commission. Under the law of Ohio, whether the order of commitment is temporary or permanent, the right to physical custody of a committed child passes from his parents to the Youth Commission. Ohio Rev. Code Ann. § 5139.05(B).[2]

Determinations with far less drastic consequences than this one have been held to present the requisite finality for review by this Court. Thus this Court held reviewable the certification of a collective bargaining representative by a state labor relations board, sustained by the state courts, "although it did not itself command action but . . . was enforceable only by another proceeding." *LaCrosse Telephone Corp.* v. *Wisconsin Employment Relations Board*, 336 U.S. 18, 23 (1949). This Court emphasized that the administrative determination "fixes a status to which Wisconsin provides a sanction," the determination was "not an abstract determination of status," and it "established legal rights and relationships." *Id.*, 336 U.S. at 22, 24.[3]

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[2] The judgment of delinquency—although it does not "impose any of the civil disabilities ordinarily imposed by conviction," *id.* § 2151.35—may be considered by any court in a future criminal proceeding against the individual with respect to sentencing and probation. *Id.*

[3] "[D]eclaratory judgments are final, although the judgment is itself not coercive." Robertson & Kirkham, *Jurisdiction of the Supreme Court of the United States*, § 37, p. 71 n. 1 (1951); see *Nashville, C. & St. L. Ry.* v. *Wallace*, 288 U.S. 249 (1933).

A fortiori, this is true of the judgment in the present case, which affixed this juvenile's status as a delinquent and operated coercively on him.

Respondent's contention that the judgment is not final because of the power of the Juvenile Court to certify an adjudicated delinquent for trial as an adult will not withstand analysis. The juvenile delinquency proceeding and an adult prosecution are separate proceedings. This Court has held finality to arise from numerous judicial proceedings which are connected with or even incidental to another proceeding:

> "In proceedings in prohibition, habeas corpus, coram nobis, mandamus, and quo warranto, it is sufficient, for purposes of review by the Supreme Court, if the judgment of the highest court of the state finally determines the right of the petitioner to the writ sought, *These proceedings are considered as independent, even when in fact incidental to some other proceeding.*" Robertson & Kirkham, *supra,* § 36, pp. 69-70.[4]

Nor does the possibility of some other type of disposition order by the Juvenile Court deprive the present judgment of finality. The Ohio statute authorizing appeal from such judgments and the decision of the District Court of Appeals holding the judgment in this case final and appealable are based on a sound appreciation of the nature

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[4] Thus, in *New York ex rel. Bryant v. Zimmerman,* 278 U.S. 63 (1928), this Court held that a defendant who sought habeas corpus on federal constitutional grounds prior to trial could receive Supreme Court review, in advance of his trial on the criminal charge, of the refusal to discharge him. This Court said:

> "the proceeding was independent, adversary, and both adapted and directed to the enforcement of a most important personal right." 278 U.S. at 71.

of juvenile court proceedings and the need to provide effective review of a delinquency adjudication.

There is nothing tentative or hypothetical about the adjudication of delinquency or the consequences we have described. On the other hand, juvenile courts, once an adjudication of delinquency is made, have a continuing supervisory jurisdiction over the juvenile. See Bowman, *Appeals from Juvenile Courts*, 11 Crime & Delinquency 63, 72-73 (1965). Under the Ohio Code, § 2151.38, for example, the juvenile court may make temporary commitments for designated periods, or up to the age of 21, and may modify its orders from time to time.

The juvenile court is thus unlike a criminal court, which sentences a criminal defendant and does not maintain continuing supervisory jurisdiction over him.[5] It would be unrealistic to carry over principles of finality derived from criminal cases to juvenile dispositions. Since certainty of ultimate disposition comparable to the criminal sentence does not exist because of the continuing jurisdiction of the juvenile court, appeal might be indefinitely deferred until it was ineffective.[6] *Cf. Brown Shoe Co.* v. *United States*, 370 U.S. 294, 306-309 (1962).

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[5] In adult criminal cases, sentence is held to be the judgment and to create the finality necessary for review. *Berman* v. *United States*, 302 U.S. 211, 212 (1937).

[6] *Cf.* Calif. Welf. & Inst'ns Code, § 800:

> "A judgment or decree of a juvenile court . . . assuming jurisdiction and declaring any person to be a person [who has violated a criminal statute] . . . may be appealed from in the same manner as any final judgment . . . ."

II.

The Proceedings in the Juvenile Court Were an Adjudicative Hearing, Not a Preliminary Hearing.

Respondent and the National Council urge that the proceeding in the Juvenile Court was in the nature of a preliminary hearing to bind petitioner over for trial as an adult, rather than an adjudicative hearing on the delinquency charge. Brief for the Respondent, pp. 19-21; Brief for the National Council, pp. 5-8. Such a contention is contrary to the facts of the record, untenable under the Ohio statutes, and inconsistent with the position taken by respondent below.

Everyone treated the proceeding in the Juvenile Court as a trial of the charge of juvenile delinquency. The complaint alleges that petitioner is a delinquent child (A. 12). Petitioner was arraigned on the charge of delinquency, he was required to plead to it, and he pleaded "not guilty" (A. 28). The Juvenile Court set "trial of this cause" for September 2, 1966 (A. 41). At the outset of the proceeding on September 2, the judge said: "We're here this morning for a trial of the facts" (A. 114). The Court's journal entry of the proceeding recites that the Court "finds that said Buddy Lynn Whittington is a minor under the age of eighteen years, fourteen years of age, and is a delinquent child as set forth in the complaint" (A. 54).

The District Court of Appeals treated and decided the case as an appeal from a judgment adjudicating petitioner's delinquency. The very first sentence of its opinion states:

"This is an appeal by Buddy Lynn Whittington from a judgment of the Juvenile Court finding him to be a delinquent child" (A. 255).

The Court of Appeals further stated:

> *"Buddy Lynn Whittington having been tried by the Juvenile Court as an alleged delinquent and not under the criminal statutes,* and the burden of proof being by a preponderance of the evidence, we do not find the judgment of the Juvenile Court finding Buddy to be a delinquent child to be either against the manifest weight of the evidence of contrary to law. We find no violation of his constitutional rights and no error prejudicial to him. Neither do we find the Juvenile Code to be unconstitutional" (A. 271). (Emphasis supplied.)

No one has even suggested before that the proceeding below was anything but an adjudicative hearing on delinquency, or that the constitutional questions presented by this record can be avoided by treating the proceeding as a probable cause hearing. Indeed, respondent in the courts below and in opposing the petition for certiorari, took a directly opposite view—that the Juvenile Court's statement about probable cause should be disregarded and that the Juvenile Court's journal entry finding petitioner to be a delinquent child should control.[7]

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[7] See Respondent's Answering Brief in the District Court of Appeals, p. 25; Memorandum of Plaintiff-Appellee Contra Motion in Support of Jurisdiction in the Supreme Court of Ohio, pp. 10-11; Respondent's Brief in Opposition to Petition for Certiorari in this Court, pp. 10-11.

Indeed, respondent appears to contradict both itself and the National Council in its own Brief in this Court, since it still urges

Contrary to the novel contention now advanced, the Ohio juvenile code clearly and unambiguously requires an adjudication of delinquency before the question of certifying a juvenile for trial as an adult arises. Certification is one form of disposition of an already adjudicated delinquent, as is apparent from the face of Ohio Rev. Code Ann. § 2151.26:

> "In any case involving a *delinquent child* under sections 2151.01 to 2151.54, inclusive, of the Revised Code, *who has committed an act which could be a felony if committed by an adult,* the juvenile judge, after full investigation and after a mental and physical examination of such child has been made by the bureau of juvenile research, or by some other public or private agency, or by a person qualified to make such examination, may order that such child enter into a recognizance with good and sufficient surety, subject to the approval of the judge, for his appearance before the court of common pleas at the next term thereof, for such disposition as the court of common pleas is authorized to make for a like act committed by an adult; or the judge may exercise the other powers conferred in such sections in disposing of such case." (Emphasis supplied.)

Respondent and the National Council, in trying to treat the adjudicative hearing in the present case as a probable cause hearing, are in effect asking this Court to rewrite the statute to make the passages emphasized above read

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this Court, in passing on the standard of proof question, to disregard the Juvenile Court's language about probable cause and look solely to the journal entry. Brief for the Respondent, pp. 47-48.

"an *alleged* delinquent child," "who is *alleged* to have committed an act which could be a felony if committed by an adult."

It is also plain from the last sentence of § 2151.26, *supra*, that respondent's construction of the statute is untenable. In authorizing the judge to "exercise the other powers conferred in such sections in disposing of such case," the statute must be referring to § 2151.35, which is the section dealing with disposition. Section 2151.35 unequivocally provides:

> "*If the court finds that the child is a* juvenile traffic offender or is *delinquent,* neglected, or dependent, it may by order entered proceed as follows:
>
> [There follow the dispositional powers conferred on the Juvenile Court]" (emphasis supplied).

A finding of delinquency in an adjudicative hearing thus must precede any dispositional action by the Juvenile Court, including certification for trial as an adult. Justice Bell of the Supreme Court of Ohio has described the operation of § 2151.26 in exactly this way:

> "Let us examine the procedure to be followed under these statutes. A juvenile is arrested and charged with the crime of rape. Under Section 2151.25, such juvenile must be brought before the Juvenile Court. Then, under Section 2151.26, provided such juvenile is found to be a delinquent, the juvenile judge may order him to appear before the Court of Common Pleas. But, first, the juvenile must be found to be delinquent. And this can be done only after a hearing.

> It is only after this finding of delinquency that the juvenile judge may exercise some discretion. He may dispose of the matter by committing the juvenile to the appropriate correctional school, release him, or 'bind him over,' so to speak, to the Court of Common Pleas." *State* v. *Worden*, 162 O.S. 593, 597-98, 124 N.E.2d 817 (1965) (dissenting opinion).[8]

Indeed, respondent seems to concede as much at another point in its Brief when it states:

> "Under the statutes of the Juvenile Code of Ohio, no child can be convicted of any crime unless and until he has been found to be a delinquent child by the Juvenile Court, and only then when the act committed would have been a felony if committed by an adult . . . ." Brief for the Respondent, p. 40.

The National Council states, at page 7 of its Brief, that if the Ohio statute is read as plain English requires it must be, the statute creates a double jeopardy bar to certification and subsequent trial as an adult. Such a contention affords no authority for this Court to construe a state

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[8] The dissent was on another point in the case, and there is no indication that the majority had any disagreement with his construction of the statute on the point with which we are here concerned.

Oklahoma has a statute similar to Ohio's on certification, Okla. Stat. tit. 10, § 112 (1966). The Oklahoma Court of Criminal Appeals has held that a proceeding like that in the present case is a delinquency hearing, not a preliminary hearing preparatory to certification, because the adjudication of delinquency is a prerequisite to valid certification. *Ex parte Lewis*, 85 Okla. Cr. 322, 188 P. 2d 367, 381 (1947).

statute contrary to its plain meaning. The question of double jeopardy is not before this Court in this proceeding.[9]

If the proceeding in the Juvenile Court were now to be construed by this Court as a probable cause hearing directed to certification, rather than an adjudicative hearing on the delinquency charge, an equally serious constitutional problem would be presented. The principle of fair notice established by this Court in *In re Gault,* 387 U.S. 1, 31-34 (1967), would surely require that an accused juvenile, his parents, and counsel receive notice of the nature of a hearing that can have such "tremendous consequences," and is a " 'critically important' " stage of juvenile proceedings, *Kent* v. *United States,* 383 U.S. 541, 554, 556 (1966). The notice here was of an adjudicative hearing on the merits of the delinquency charge, the case was tried on that basis, and has been reviewed on that basis. The fair notice required by *Gault* would be absent if this were now treated as a probable cause hearing.

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[9] The question whether a finding of delinquency bars a certification and a subsequent adult trial is one on which courts have differed in the few cases to consider the point, and it must be deemed unresolved. Compare *United States* v. *Dickerson,* 168 F.Supp. 899 (D. D.C. 1958), *rev'd on other grounds,* 271 F.2d 487 (D.C. Cir. 1959), with *Johnson* v. *State,* Maryland Court of Special Appeals, decided February 14, 1968, 2 Crim. L. Rep. 2411. See generally Sheridan, *Double Jeopardy and Waiver in Juvenile Delinquency Proceedings,* Federal Probation, December, 1959, pp. 43-47.

III.

Petitioner's Constitutional Rights Were Violated in the Proceedings Below.

(a) *Standard of Proof*—We note that the National Council makes little effort to defend the "preponderance of the evidence" test applied by the District Court of Appeals to uphold the judgment, other than to suggest that the differences between the civil and criminal standards are "rather subtle," Brief of the National Council, p. 14. If this is intended to suggest that the difference is not substantial or of practical importance, we submit that every lawyer who has tried cases in court would disagree. Proof beyond a reasonable doubt in Ohio means proof which brings about "an abiding conviction to a moral certainty of the truth of the charge." Ohio Rev. Code Ann. § 2945.04. This is a significantly greater burden than the "preponderance" test.

The National Council appears to prefer the "clear and convincing" test, on the theory that Juvenile Court jurisdiction originated in chancery and "clear and convincing" evidence is an accepted standard in equity. As we point out in our Brief, under either the "reasonable doubt" or the "clear and convincing" standard, the judgment against petitioner must be reversed. Brief for petitioner, pp. 50, 54-56. We continue to believe, as the Supreme Court of Illinois recently held in *In re Urbasek,* now reported at 232 N.E.2d 716 (1968), that the "reasonable doubt" standard is to be preferred in a serious law violation case. Chancery practice, as this Court made clear in *Gault,* is an unreliable guide to determining procedures in juvenile

courts; the doctrine of *parens patriae* may have originated in chancery, but "its historical credentials are of dubious relevance" in dealing with constitutional rights. 387 U.S. at 16.

(b) *Impartial Trier of Fact*—(i) The National Council asserts, without citation of authority, that it is a common practice, even in District Courts of the United States, for a judge who issues a search or arrest warrant to preside at the trial of the person searched or arrested. Brief of the National Council, p. 17. Even if this were assumed to be so, it would not uphold the Juvenile Court judge's participation in the investigatory and accusatory phase of this case as shown by this record. The point is that in trials in the District Courts of the United States, in all save "petty offenses," there is a constitutional right to an independent and impartial trier of fact, a jury. The Ohio Code affords no such right, and the Juvenile Court judge here acted as sole trier of fact.[10]

Respondent asserts that there is nothing in the record to show that the Juvenile Court judge knew of the "evidence" in the case prior to the adjudicative hearing. Brief for the Respondent, p. 35. The record clearly establishes that *facts* about the case—"the investigation, the kind of investigation, who was involved" (A. 121)—were confided by the probation officer to the judge prior to adjudication; whether or not the details of the "evidence"—the means

[10] There is no need, even in a one-judge jurisdiction, for the Juvenile Court judge to perform such functions as issuing arrest warrants. This Court has held that the function of determining that a person shall be arrested need not "be confided to a strictly judicial officer or tribunal;" it may be delegated to a prosecuting official. *Ocampo* v. *United States*, 234 U.S. 91, 100 (1914).

by which facts are proved at a trial—was confided is immaterial to the danger of prejudgment arising from this practice.

The National Council is mistaken in asserting that we contend it is "constitutionally impermissible" for a probation officer to conduct "any investigation before trial." Our position on this point is essentially that of the framers of the proposed Uniform Juvenile Court Act, who provide:

> "After a petition has been filed under this Act, and at such time as the court may direct, a social study and report to the court in writing shall be made by the [probation officer] of the court . . . concerning the child, his family, his environment and other matters relevant to the disposition of the case, *except that if the allegations of the petition are denied by a party . . . the investigation and report shall not be made until the court finds, after a hearing on the petition pursuant to this Act, that the child is delinquent. . . .*" National Conference of Commissioners on Uniform State Laws, Second Tentative Draft, Uniform Juvenile Court Act, p. 31 (1967).

See also Children's Bureau, HEW, *Standards for Juvenile and Family Courts*, pp. 13, 54-55 (1966).

What we do contend is that in a contested law violation case like the present, the probation officer, as an arm of the Juvenile Court, should not act as a composite policeman, prosecutor, and witness against the juvenile, as the probation officer did in this case.[11]

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[11] Contrary to the suggestion of the National Council, pp. 18-19 of its Brief, timely objection to the Ohio practice was made in this case prior to adjudicative hearing, by motion to dismiss the proceeding (A. 42).

(ii) On March 5, 1968, a three-judge Federal Court in the Southern District of New York held that the Federal Juvenile Delinquency Act, 18 U.S.C. § 5033, is unconstitutional insofar as it denies a jury trial to an accused juvenile delinquent charged with violating a federal criminal statute. *Nieves* v. *United States*, 67 Civ. 2399. Judge Tyler wrote:

> "The right to a jury trial is available in all non-petty federal criminal prosecutions. U.S. Const. amend. VI. Notwithstanding the fact that the FJDA seems to indicate that federal juvenile court proceedings are not to be considered criminal, 18 U.S.C. § 5032 (1964), we read *Gault* to require the availability of that right in any federal juvenile proceeding in which a youth is faced with incarceration for the commission of an act alleged to be violative of federal law. It is clear to us that an FJDA proceeding which may lead to a juvenile's loss of liberty by incarceration, for purposes of the Sixth Amendment right to trial by jury, is in nature a criminal prosecution, and the constitutionally guaranteed right of a trial by jury in all federal criminal prosecutions must, therefore, accompany such a proceeding." Opinion, pp. 33-34.[12]

The Family Court of Rhode Island has also recently held the right of jury trial applicable in a delinquency case in

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[12] The Court also held that the Act was not saved by the juvenile's right to choose an adult criminal trial instead of a juvenile delinquency proceeding and thus obtain his jury trial. *Id.*, p. 24.

It further emphasized that it was dealing only with law violation cases under the Federal Juvenile Delinquency Act; the Act does not cover truancy or incorrigibility. Opinion, p. 34 n. 9. And it predicted that, in most cases, the juvenile would probably waive his jury trial, and the efficacy of juvenile proceedings under the Act would not be significantly interfered with by the jury trial right. *Id.*, pp. 41-42.

which a child was charged with an act which would be a felony if committed by an adult. *In re Rindell,* decided January, 1968, 2 Crim. L. Rep. 3121. Judge DeCiantis wrote:

> "Trial by jury is one of the most cherished rights of man. It was devised as the best system for arriving at the truth. . . . Jury trial, therefore, is the cornerstone of *individual liberty*. . . . Jury trials are not antagonistic to Juvenile Court proceedings . . . it would seem almost unthinkable that the Court would deprive the juvenile of the most cherished right accorded to man: an impartial trial by jury." 2 Crim. L. Rep. 3122, 3125-26. (Emphasis in original.)

(c) *Privilege Against Self-Incrimination and Right to Counsel.*—Respondent has attempted to rewrite the record on the interrogation of petitioner. At two places, pp. 6 and 58 of its Brief, respondent makes assertions as to the duration of the questioning of petitioner and as to the questioning of other persons during the course of the evening which lack support in the record. Respondent also makes the extraordinary statement that when petitioner was questioned by law enforcement officials, he was not "a definite suspect." *Id.*, p. 56. In view of the fact that a dead body had been found under his bed a short time before and that the Juvenile Court probation officer had been called in to participate in interrogating him, this assertion taxes credulity beyond the breaking point. Petitioner was unmistakably the target of this investigation, and there was no excuse for not giving him the *Miranda* warnings and an opportunity to consider with his parents and counsel whether to submit to interrogation.

Respondent makes much of the claim that petitioner was not formally taken into custody until several days after his interrogation. Brief for the Respondent, p. 56. But *Miranda* is not limited to the situation in which a formal charge has been lodged or an arrest designated as such by the authorities has been made. It is designed to assure that a suspect or accused person has the opportunity to exercise his privilege against self-incrimination if he chooses to do so, or to talk to the authorities if he freely and knowingly chooses to do that. Juveniles need that protection even more than adults, and in Ohio they especially need it in interrogations when a formal charge has not been brought. The Supreme Court of Ohio has held—in a case involving another tandem interrogation of another juvenile by the prosecuting attorney and the same Juvenile Court probation officer involved in the present case—that the duty to take a juvenile "directly before the Juvenile Court" under § 2151.25 of the Juvenile Code applies only when there is a formal charge lodged against the juvenile. The Court said:

> "It does not apply nor would it be practicable to apply it to every juvenile picked up for interrogation by the authorities. In this case, defendant was picked up in the first instance for questioning in relation to the murder of the deceased; he was not then charged with any offense, and absent a charge, Section 2151.25, Revised Code, is not applicable." *State* v. *Carder*, 9 O.S.2d 1, 222 N.E.2d 620, 627 (1966).

This permissive approach to interrogation of juveniles makes it advantageous to law enforcement officials not to lodge a charge against a juvenile, in order that they may

obtain greater freedom to interrogate him. It makes all the more essential the giving of the *Miranda* warnings to assure that the juvenile is speaking freely and with due appreciation of the seriousness of the situation with which he is confronted.

(d) *Prehearing Release and Cruel and Unusual Punishment*—Contrary to the apparent belief of respondent and the National Council, we do not urge a right to release on money bail as the sole constitutional form of prehearing release. We urge either the right to bail or its substantial equivalent in the form of a right of prehearing release unless the necessity for detention is demonstrated under prescribed judicial standards.

The Ohio statute governing prehearing release, § 2151.31, is totally deficient in providing for such a right. It prescribes no standards for detention, requires no detention hearing, puts no limit on prehearing detention, requires no statement of reasons for detention by the Juvenile Court judge, and provides no remedy for judicial abuse of discretion.[13] It is "a license for aribtrary procedure" as it stands, and the National Council concedes that "appellant was treated unfairly" under it in this case. Brief of the National Council, p. 27.

The right of juveniles to be free from cruel and inhuman punishment is receiving increasing recognition in the states. In the Rhode Island Family Court, Judge DeCiantis has

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[13] It has been held that juveniles do not have the right to test the legality of their prehearing detention by habeas corpus. *State ex rel. Peaks* v. *Allaman,* 115 N.E.2d 849 (Ohio App. 1952). Adult defendants, on the other hand, can seek habeas corpus as a remedy for unlawful denial of bail. *State* v. *Bevacqua,* 147 O.S. 20, 67 N.E.2d 786 (1946).

held that when punishment is administered to a juvenile "of such nature as to shock the general conscience"—in that case confinement in an adult correctional institution in what was referred to as "the hole"—the Juvenile Court has a duty to intervene. *Rhode Island State Police* v. *Poole*, No. Z-3248 December 22, 1966. He ordered the release of a juvenile, held under such conditions, to his family.[14]

Conclusion

For the foregoing reasons and the reasons stated in Petitioner's Brief, we respectfully submit that the judgment below should be reversed.

Respectfully submitted,

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[14] The Juvenile Division of the Illinois Cook County Circuit Court has also held that a juvenile committed to a state institution has a right under the Eighth Amendment as incorporated into the Fourteenth to receive treatment, not merely custodial confinement. *In re Harris*, December 22, 1967, 2 Crim. L. Rep. 2412.

SUPREME COURT OF THE UNITED STATES

No. 701.—October Term, 1967.

In the Matter of Buddy Lynn Whittington, Petitioner.	On Writ of Certiorari to the Court of Appeals of Ohio, Fairfield County.

[May 20, 1968.]

Per Curiam.

Petitioner, who was 14 years old at the time, was adjudged a delinquent by the Juvenile Court of Fairfield County, Ohio, on September 7, 1966, on the basis of the trial judge's finding that there was "probable cause" to believe that he had committed a crime that would be a felony if committed by an adult, namely, second-degree murder. Petitioner appealed to the Ohio Court of Appeals for Fairfield County, contending that the proceeding in the Juvenile Court which resulted in the order adjudicating him a delinquent violated his rights under the Due Process Clause of the Fourteenth Amendment. Specifically he argued that he had been determined to be a delinquent on the basis of an unconstitutionally low standard of proof, and that he had been denied his constitutional rights to trial by jury, to an impartial tribunal, and to bail pending disposition of the case against him; he also contended that his privilege against self-incrimination had been violated by the admission into evidence against him of statements made in response to questioning from police officers. The Ohio Court of Appeals rejected these contentions and affirmed the judgment of the Juvenile Court on January 3, 1967. 13 Ohio App. 2d 11. On March 15, 1967, the Supreme Court of Ohio, *sua sponte*, dismissed petitioner's further appeal on the

ground that it presented "no substantial constitutional question." Petitioner then filed a petition for certiorari in this Court, which we granted, 389 U. S. 819 (1967), raising the same issues presented in the Ohio courts.

Under Ohio law an adjudication that a child is a delinquent can have numerous substantial consequences. For example, once such a determination is made the Juvenile Court may place the child in a variety of state institutions or in a foster home. Ohio Revised Code § 2151.35. Another alternative disposition in a case where the child has been found to have committed a felony is for the Juvenile Court to bind the child over to the Court of Common Pleas for trial under the criminal statutes applicable to adults. Ohio Revised Code § 2151.26.* At the time the petition for certiorari was filed in this case on April 11, 1962, no disposition beyond the adjudication itself and ordering of a physical and mental examination of petitioner had been made by the Juvenile Court. We have since been informed by the parties that petitioner has been bound over for trial as an adult and that he has been indicted for the crime of first-degree murder.

The State argues vigorously that, because of the disposition subsequently made by the Juvenile Court, the proceeding at which the determination of delinquency was made was merely the equivalent of a probable cause hearing for an adult. Petitioner, on the other hand,

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*In addition, Ohio specifically provides that a delinquency judgment may be considered by any court with respect to sentencing or probation in subsequent criminal proceedings. Ohio Rev. Code § 2151.35. For a general discussion of the practical consequences for juveniles of a delinquency record, see the President's Commission on Law Enforcement and Administration of Justice, The Challenge of Crime in a Free Society 66–67, 75 (1967), and its Task Force Report: Juvenile Delinquency and Youth Crime 92–93, 360–861, 385, 417–418 (1967).

asserts that his adjudication as a delinquent is final for purposes of appellate review and that substantial consequences of that decision continue despite the supervening transfer of jurisdiction over petitioner to the adult criminal courts. The resolution of this dispute is crucial to many of the issues presented by petitioner, since, for example, in ordinary probable cause hearings involving adults there is no right to either trial by jury or a finding of guilt beyond a reasonable doubt. The unresolved question under Ohio law is not whether the adjudication of delinquency is a final, appealable order. The Ohio Courts of Appeals considered that issue and ruled that the order is appealable, and the Ohio Supreme Court necessarily accepted this conclusion because its dismissal of the appeal was not based on the jurisdictional issue. The question which the Ohio courts have not settled is what, if any, effect the "disposition" order, entered after their decisions on the appeal and after the petition for certiorari was filed here, has upon the prior delinquency determination made by the Juvenile Court.

On the constitutional issues, petitioner relies heavily on *In re Gault*, 387 U. S. 1, which was decided on May 15, 1967, some two months after the dismissal by the Ohio Supreme Court in this case. In *Gault*, this Court held squarely, for the first time, that various of the federal constitutional guarantees accompanying ordinary criminal proceedings were applicable to state juvenile court proceedings where possible commitment to a state institution was involved. Because the Ohio courts have not had the opportunity to assess the impact of that decision on petitioner's claims, we deem it appropriate to vacate the judgment of the Ohio Court of Appeals and remand the case for reconsideration in light of *Gault*. Upon such remand, the Ohio court may, of course, also consider the impact, if any, on the questions raised by petitioner of

the intervening order of the Juvenile Court requiring him to face trial in the adult courts.

The judgment is vacated and the case is remanded to the Ohio Court of Appeals for Fairfield County for consideration in light of *In re Gault*, 387 U. S. 1 (1967).

Vacated and remanded.

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Mr. Justice White, with whom Mr. Justice Black joins, dissenting.

I would dismiss this case because the determination of delinquency which we have before us is not a final judgment within our appellate jurisdiction over proceedings in state courts. 28 U. S. C. § 1257. *Eastman* v. *Ohio*, 299 U. S. 505 (1936); *Polakow's Realty Experts, Inc.* v. *Alabama*, 319 U. S. 750 (1943); see *Berman* v. *United States*, 302 U. S. 211, 212 (1937); *Edwards* v. *California*, 314 U. S. 160, 171 (1941); R. Stern & E. Gressman, Supreme Court Practice § 3–15 (3d ed. 1962); Robertson & Kirkham's Jurisdiction of the Supreme Court of the United States, § 39 (R. Wolfson & P. Kurland, eds. 1951). The juvenile court's formal order found petitioner to be delinquent but made no final disposition of his case; it did not relinquish jurisdiction to the adult court, place petitioner on probation, or commit him to a juvenile institution. Since that time, however, the juvenile court has entered an order relinquishing jurisdiction to the adult court. That order is now on appeal in the courts of Ohio, and that order may be a final judgment of the juvenile court falling within the reach of our appellate jurisdiction. If that order were properly before us now, it would raise the question of the constitutionality of the procedures employed to determine delinquency where such a determination is a prerequisite (as it

may be under Ohio law) to relinquishing jurisdiction to the adult court. I do not believe that turnover proceedings require all of the formalities which should attend a determination of delinquency for purposes of final disposition in the juvenile court itself. I also have great doubt that the finding of delinquency in this case, and any consequences which normally attach to it, would in any way survive a trial and a not guilty verdict in the adult courts.